No. 80-169

IN THE

Supreme Court of the United States

October Term, 1980

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

WILLIAM MITCHELL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 5, 1980.
CERTIORARI GRANTED OCTOBER 14, 1980.

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DOCKET ENTRIES (District Court)

7/20/78	Complaint filed. Summons issued.
8/31/78	Summons ret. and filed/executed
9/ 6/78	By SIFTON, J—Stip. & order extending the time for UPS to answer to 10-11-78.
9/14/78	By SIFTON, J.—Stipulation and order dtd 9/11/78, extending time to answer or otherwise move as to Deft Local Union #177, to Sept. 30, 1978. Filed.
10/ 4/78	ANSWER on behalf of Local Union No. 177, I. B. T., to complaint. Filed.
10/10/78	ANSWER of INT'L. BROTHERHOOD OF TEAMSTERS, etc. to complaint. Filed.
10/11/78	ANSWER of Deft United Parcel Service, Inc. filed
10/16/78	Pltff's interrogatories to deft local union #177, filed.
10/17/78	ANSWER, filed. jm (deft United Parcel Serv.)
10/25/78	Pltffs interrogatories to deft. United Parcel Service, filed.
11/ 2/78	AMENDED ANSWER of Deft United Parcel Service, Inc. filed
11/30/78	Responses of Deft United Parcel Service to Pltff's Interrogatories filed
12/ 8/78	Notice of Deft United Parcel Service, Inc. to take deposition of pltff on 1/4/79 at 10:00 a.m. filed

12/20/78 By Sifton, J.—Order dtd 12/19/78 Status conf 1/18/79 @ 4:30 PM, filed. jm copies sent.

1/18/79 BEFORE SIFTON, J. Case called. Status conference held. Case adj. to March 26, 1979 @ 4:30 PM to fix a date for trial

2/ 9/79 Amended answer of Local union 177 filed.

2/ 9/79 Stipulation that deft Local 177 may file an amended answer by 1/31/79 filed.

3/14/79 Notice to take deposition of J/ Purcell, J. Kilkenny filed.

3/26/79 Before SIFTON, J.—Case called for conf. pretrial order signed, pre-trial conf. for 6-20-79.

3/28/79 By SIFTON, J.—Civil Pretrial Order dated 3/23/79 that the attys for all parties shall be ready to proceed to trial after 6/20/79, etc. (see pretrial Order) filed

5/18/79 Before SIFTON, J.—Case called. Conference held & concluded.

6/ 5/79 Notice of motion with memo of law, ret 6/20/79 @ 4:30 PM for order discomplaint or granting summary judgment in defts favor, filed.

6/11/79 Notice of motion ret 6-20-79 at 4:30 PM filed by deft International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America for an order dismiss the complaint etc. filed with memo of law in support.

6/27/79 Stenographer's Transcript dtd 1/16/79, filed.

6/28/79 Before Sifton, J. Case called. Counsel for all sides present. Motion adjd to 8-15-79 at 9:30 a.m. Reply papers to be submitted by 8-13-79. Answering papers by 7-17-79.

7/19/79 Affidavit of William Mitchell, in opposition to summary judgment motion of deft's. Filed.

7/19/79 Pltff's memorandum of law, in opposition to deft's motion for summary judgment. Filed.

8/ 8/79 Letter from M. David Zurndorfer dtd 8-1-79 filed.

8/ 8/79 By SIFTON J—Order dtd 8-3-79 adjourning motion to dismiss to 9-12-79 at 9:30 A. M. filed on document #26.

9/ 4/79 Reply memo. in support of deft. Up's motion to dismiss and/or for summary judgment. filed

9/ 4/79 Kilkenny Supplemental affidavit in support of motion to dismiss and/or for summary judgment. filed

10/12/79 Before SIFTON, J. Case called. Counsel for all sides present. DECISION RESERVED. on balance of motion. Motion of International Union to dismiss GRANTED w/consent of pltff. International to submit separate judgment.

10/28/79 By SIFTON, J.—Judgment dtd 9/26/79, that the pltff take nothing of Deft. Int'l. Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and this action be dismissed on the merits as to above named deft. Filed.

10/25/79 By SIFTON, J. MEMORANDUM & ORDER dtd 10/23/79 that defts motion for summary judgment is GRANTED & the clk is directed to enter judgment dismissing pltff's complaint & to mail a copy of this opinion to counsel for all parties, filed. Copies mailed to all counsel.

10/26/79 Judgment filed, signed by Clerk dtd 10-25-79, it is Ordered & Adjudged that the pltff take nothing of the defts; that defts motion for summary judgment is granted; & that judgment is hereby entered dismissing the complaint. (p/c mailed)

11/ 7/79 Bill of Costs in the amount of $550.13, filed

11/ 9/79 Notice of Appeal, filed. (copy of docket sheet and appeal mailed to C of A)

11/ 9/79 Receipt for filing record on appeal, filed. (copy mailed to C of A)

DOCKET ENTRIES (Court of Appeals)

11/13/79	Copy of notice of appeal and district court docket entries on behalf of appellant Mitchell filed
11/13/79	Copy of notice of payment of docketing fee in district court filed
11/16/79	Appellant Mitchell Form C, pfs filed
11/16/79	Appellant Mitchell Form D, pfs filed
11/23/79	Record on appeal filed (original papers of district court)
11/30/79	Scheduling Order #1, PC filed.
12/31/79	Appellant Mitchell brief, pfs filed.
12/31/79	Appellant Mitchell appendix, pfs filed.
1/25/80	Appellee UPS Inc. Brief pfs, filed.
2/19/80	Appellee Local 177, I. B. T. motion for extension of time to file brief, pfs filed. (Order endorsed: 2-21-80 granted for leave to file appellee's brief filed.
2/21/80	Appellee Department Store and Wholesale Drivers Warehouseman and Helpers Local Union #177 brief filed.
2/21/80	Appellant WILLIAM MITCHELL reply brief, pfs filed.
2/29/80	Case argued before Kaufman, Ch. J., Timbers, C.J., Werker, D.J.
3/ 3/80	Judgment reversed and remanded, published opinion, Timbers C.J.
3/ 3/80	Judgment filed.

3/12/80	Appellant WILLIAM MITCHELL itemized and verified bill of costs filed, pfs filed.
3/14/80	Appellant WILLIAM MITCHELL statement of cost filed.
3/14/80	Appellee UNITED PARCEL SERVICE, INC., et al motion for extension of time to file *petition for rehearing* until 3-24-80 pfs filed. Appellee UNITED PARCEL SERVICE, INC., et al motion for extension of time to file *petition for rehearing en banc* until 3-24-80 pfs filed (Order endorsed: 3-14-80: granted (WHT) filed.
3-24-80	Appellee UNITED PARCEL SERVICE, INC., *petition for rehearing pfs filed.* Appellee UNITED PARCEL SERVICE, INC., *petition for rehearing en banc pfs filed.*
5/ 7/80	Order denying Appellee United Parcel Service, Inc. petition for rehearing filed. Order denying Appellee United Parcel Service, Inc. petition for rehearing en banc filed.
5/15/80	Mandate (Judgment, statement of costs, Opinion) filed.
6/ 5/80	Record on Appeal Returned to District Court.
6/ 9/80	Record on Appeal Receipt filed.
8/11/80	Notice of filing of petition for writ of certiorari filed.
10/22/80	Certified copy of order of Supreme Court granting petition for writ of certiorari filed.

COMPLAINT WITH ATTACHMENTS
(Filed July 20, 1978)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 C 1547

WILLIAM MITCHELL,

Plaintiff,

— against —

United Parcel Service, Inc., Department Store and Wholesale Drivers, Warehousemen and Helpers, Local Union #177, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Defendants.

TRIAL BY JURY DEMANDED

Plaintiff complaining of the defendants by his attorneys IRA LEITEL and DAVID JAROSLAWICZ alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant the Labor Management Relations Act, 1947, § 301; 29 U. S. C. 185 and the Rules of Pendent Jurisdiction.

2. Venue is properly placed in the United States District Court for the Eastern District of New York, since the plaintiff resides within the Eastern District, many of the events complained of occurred within the Eastern District and the defendants are unions representing employees in the Eastern District of New York.

THE PARTIES

3. At all times hereinafter mentioned the plaintiff WILLIAM MITCHELL was employed by the defendant United Parcel Service, Inc. as a car washer.

4. Upon information and belief United Parcel Service, Inc. ("UPS") was a Delaware Corporation with its principal place of business in New Jersey and maintains offices throughout the United States including 643 West 43rd Street in the City, County and State of New York.

5. Upon information and belief at all times hereinafter mentioned the defendant Department Store and Wholesale Drivers, Warehousemen and Helpers, Local Union #177 (Local #177) was a labor organization of which the plaintiff was a member in good standing.

6. Upon information and belief the defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("International") was the parent organization of Local #177 and had a responsibility to protect the rights of its local's members.

AS AND FOR A FIRST CLAIM FOR RELIEF

7. At all times hereinafter mentioned the plaintiff was employed by the defendant UPS as a full time employee with the job title of car washer.

8. At the time of the occurrence complained of plaintiff had been employed by UPS for a period of approximately 13 years.

9. In or about 1976 and 1977 the defendant UPS made it known that it was seeking to eliminate full-time employees and replace them with part-timers.

10. In January of 1977, in an attempt to improperly dismiss the plaintiff from his position, the defendant UPS

charged the plaintiff with dishonesty, falsifying his time cards and various other actions and sought to discharge him from his position with UPS (See Exhibit "A", annexed hereto).

11. Pursuant to a collective bargaining agreement between Local #177, the International and UPS, the plaintiff advised the representatives of Local #177 that the charges brought against him were false and requested the union to file a grievance on his behalf so that the merits of the allegation could be heard by an arbitrator and to otherwise protect his rights and job.

12. The union defendants, particularly Local #177, filed a grievance on the plaintiff's behalf and advised the plaintiff that they would act on his behalf and protect his rights.

13. Despite the fact that the plaintiff had clearly advised the union, Local #177, that the charges brought against him were false and had no merit, the union, in a perfunctory fashion, prepared a grievance claiming that the plaintiff had in fact committed the improper actions he had been accused of but that the penalty of discharge was too severe. (See Exhibit "B", annexed hereto).

14. The defendants proceeded in an arbitrary fashion, in violation of due process and the plaintiff's rights under the collective bargaining agreement to advise the plaintiff by telegram on the afternoon of February 14, 1977 that the plaintiff's grievance would be heard by a panel of arbitrators in Virginia Beach, Virginia on February 16, 1977 and that if the plaintiff wished to attend he must assume all expenses. (See Exhibit "C", annexed hereto).

15. Upon receipt of the telegram the plaintiff advised the defendants that he did not have the funds to provide

transportation for himself and his witnesses to Virginia Beach, Virginia.

16. Despite such knowledge the defendants refused to provide the plaintiff with funds, an adequate opportunity to obtain funds to travel to Virginia, or to move the hearing to the New York area where the plaintiff would have an opportunity to contest the charges on the merits.

17. The defendants with knowledge that the plaintiff could not attend the hearing in Virginia, proceeded with the so-called hearing and found the plaintiff's discharge to have been proper. (See Exhibit "D", annexed hereto).

18. The plaintiff had in good faith attempted to utilize the contractual provisions of the collective bargaining agreement for settling disputes but those attempts were frustrated by the defendants actions which included:

a) the defendant, Local #177, despite actual knowledge of the plaintiff's denial of the allegations against him, instituted only a perfunctory defense, admitting the plaintiff had committed the wrongful acts he was charged with.

b) the defendant, Local #177, ignored the plaintiff's meritorious defense to the charges brought against him and processed that grievance in a perfunctory and grossly negligent fashion so as not to protect the plaintiff's rights. and

c) the defendants acted in an arbitrary and capricious manner by setting the arbitration hearing in Virginia Beach, Virginia, when all of the events and witnesses were in New York, and refusing to provide the plaintiff with funds to travel to Virginia to attend the hearing with his witnesses or to adjourn the hearing.

19. The defendants, by entering into a collective bargaining agreement, stripped the plaintiff of his traditional

form of seeking redress in the courts and then breached that collective bargaining agreement by acting in a discriminatory fashion, in bad faith and in an arbitrary and capricious manner so as to deprive the plaintiff of any hearing at all.

20. The defendants' improper actions as aforesaid caused the plaintiff to be damaged in that among other things, the plaintiff lost his position with UPS after 13 years including all benefits and pension rights, the plaintiff could not obtain other employment because of the nature of the charges brought against him, and as a result of which he was discharged, the plaintiff incurred many debts and financial obligations and was forced to undergo personal bankruptcy; he suffered a loss of reputation and his good-name, he suffered severe mental anguish and distress and the plaintiff was otherwise damaged.

21. By reason of the foregoing, plaintiff is entitled to recover from the defendants all of the damages which he has suffered by reason of the defendants wrongful acts as aforesaid.

AS AND FOR A SECOND CLAIM FOR RELIEF

22. Plaintiff repeats, reiterates and realleges all allegations contained in paragraphs one through twenty-one of this Complaint as if more fully set out herein.

23. Upon information and belief the charges brought against the plaintiff by the defendant UPS were known to be false at the time they were brought and the real reasons for bringing the charges against the plaintiff were because of the plaintiff's refusal to perform duties he was not required to perform pursuant to his employment agreement and in order to effectuate UPS policy to eliminate full-time employees and replace them with part-time employees

so that UPS could achieve a savings on the amount being paid to employees.

24. The defendants' actions in bringing false charges against the plaintiff and then upon information and belief conspiring with the remaining defendants to prevent the plaintiff from having an opportunity to defend against those charges and to insure his discharge were performed in a malicious, reckless and wanton manner without a regard for the rights of the plaintiff and with the intention of injuring the plaintiff knowing that this would cause the plaintiff to undergo mental anguish and distress.

25. By reason of the foregoing plaintiff is entitled to recover from the defendants for all of his damages by reason of their intentional infliction of mental distress and with the Doctrine of prima facte tort.

AS AND FOR A THIRD CLAIM FOR RELIEF

26. Plaintiff repeats, reiterates and realleges all allegations contained in paragraphs one through twenty-five of this Complaint as if more fully set out herein.

27. The defendant UPS acted maliciously and with a wilfull disregard for the plaintiff's rights in bringing charges against the plaintiff and preventing the plaintiff from defending against those charges so as to insure the plaintiff's discharge.

28. The defendant unions acted in a wilfully, wanton and reckless fashion, and breached their fiduciary obligations to the plaintiff by failing to properly present his grievance, presenting a knowingly inaccurate and inadequate defense and arranging for a hearing with the knowledge the plaintiff could not attend and leaving the plaintiff without any redress.

29. By reason of the foregoing plaintiff is entitled to recover punitive damages from the defendant.

WHEREFORE plaintiff demands judgment against the defendants as follows:

a) Plaintiff be restored to his position with all seniority, pension and other benefits.

b) Plaintiff be awarded his full back-pay from his date of discharge.

c) Plaintiff be compensated for all such other damages which he has suffered including substantial punitive damages and

d) Plaintiff be awarded such other and further relief as to the Court seems just and proper including a reasonable attorneys fee and the costs and disbursements of this motion.

IRA LEITEL and DAVID JAROSLAWICZ
Attorneys for the Plaintiff

Office and P. O. Address
Two Lafayette Street
New York, New York 10007
(212) 596-1600

Exhibit "A"

January 28, 1977

Mr. William Mitchell
431 Woolley Avenue
Staten Island, New York 10314

Dear Mr. Mitchell:

A meeting was held in the Staten Island Center on January 13, 1977. Present were you, Local 177 officials Joe Purcell and Don Mason, shop steward Harry Stanley, Ray Cooper, Lou Pillarella, Nick Melillo, Brian Flynn and myself.

The purpose of the meeting was quite specific. We reviewed with you the fact that on numerous instances, you were observed leaving the job prior to the completion of your work day. In an effort to conceal this, you falsified your time cards. Your acts were ones of dishonesty and constitute a complete dereliction of your responsibilities as an employee.

When confronted with these facts, you denied them completely and your only explanation was that the charges against you were lies and we were out to get you. You made these comments in spite of the fact that several supervisors observed you on different occasions leaving the job.

We mentioned that we could not tolerate dishonesty from any of our employees.

As a company, we provide you with substantial wage and fringe benefits. For these benefits, we expect that all of our employees be honest with us and provide us with a fair days work.

We made it quite clear to you that you have left us no choice in this matter. Your dishonest acts cannot be toler-

ated by United Parcel Service. Based on all these *facts* presented at this meeting, we have no choice but to discharge you from our employ.

Very truly yours,

UNITED PARCEL SERVICE
/s/ JIM KILKENNY
Jim Kilkenny
DIVISION MANAGER

JK/vac
cc: B. Pastor
J. Kilkenny
Local #177
Personnel
CERTIFIED MAIL #325872

Exhibit "B"

THIS FORM MUST BE USED IN FILING ALL GRIEVANCES

ATLANTIC AREA PARCEL GRIEVANCE COMMITTEE

Date Received _____

Case No. _____

For Committees' Use Only:

Date Case Heard _____

PRE-HEARING INFORMATION

In order that the Committee Members may be familiar with the important features in this case, will you kindly fill out the following form as completely as possible. The information submitted herein will be treated as a preliminary general statement of your position.*

1. Union Name Dept. Store & Wholesale Drivers, Local 177
   Address 1001 Springfield Avenue, Irvington, N. J.
2. Name of Agent handling particular grievance Joseph Purcell
3. A. Name of Employee filing complaint William Mitchell
   B. Classification of Work Car Washer
   C. Date of Employment May 18, 1964
4. UNITED PARCEL SERVICE, INC.
   1321 Travis Avenue, Staten Island, New York
   (Address of Operation Involved)
5. Circumstances of the Dispute *(Check one)*:
   A. Warning Notice ( ) C. Discharge (X)
   B. Disciplinary time off ( ) D. Back pay claim (X)
   E. Others ( )

6. Date on which Company took action against employee January 13, 1977
7. Indicate that part of your contract which you claim was violated Article 45 (Supplement)
8. Date on which alleged violation took place June 16, 18, 20, 30, July 1, 6, 7, 8.
9. Date on which grievance was first taken up with management July 8, 1977
10. Exact amount of back pay, if any, claimed by aggrieved employee all
11. Your position (also include brief resume of pertinent facts—use back of sheet if necessary)

Mr. Mitchell was discharged for stealing time and falsifying Company records. Local 177 feels this discharge was unjust and Mr. Mitchell should be reinstated with full back pay. On Friday nights the Company allows our members to go home four hours undertime. They also have them lock the building. The Company's managers and supervisor consent to this type of activity, then it must be assumed that they will tolerate other types of misconduct. Local 177 feels that Mr. Mitchell should have been warned to stop what he was doing. Local 177 feels that Mr. Mitchell should have been suspended instead of fired.

/s/ JOSEPH J. PURCELL
For the party filing grievance

Date: FEB 3-1977

* PREPARE FOUR (4) COPIES
1st Copy—Mail to Union Co-Secretary
2nd & 3rd Copies—Mail to Employer Co-Secretary
4th Copy—Local Union

Exhibit "C"

2013735209 TDMT Irvington NJ 41 02-14 1224P EST
PBA 015 1239P
PMS WILLIAM MITCHELL, RDM REPORT DELIVERY BY MAILGRAM, DLR

431 WOOLEY AVE
STATEN ISLAND NY 10314 (*Get Time & Signature*)

PLEASE BE ADVISED THAT YOUR GRIEVANCE AGAINST UNITED PARCEL SERVICE CONCERNING YOUR DISCHARGE WILL BE HEARD BY THE PANEL ON WEDNESDAY FEBRUARY 16 1977 IN VIRGINIA BEACH VIRGINIA IF YOU WISH TO ATTEND YOU MUST ASSUME ALL YOUR EXPENSES PLEASE ADVISE RALPH PORFORA, LOCAL 177 (1001 SPRINGFIELD AVE IRVINGTON NJ 07111)

Exhibit "D"

ATLANTIC AREA PARCEL GRIEVANCE COMMITTEE

Established in accordance with the terms and conditions of the Atlantic Area Parcel Agreement, entered into by and between the several Local Unions and United Parcel Service, Inc.

Docket No. 874

IN THE MATTER OF THE DISPUTE BETWEEN

Teamsters Local #177, Irvington, N. J.
(City and State)

and

UNITED PARCEL SERVICE, INC.

SUBMISSION

We, the undersigned, parties to the Atlantic Area Parcel Agreement, hereby agree to submit the following dispute for a decision under the Rules of Procedure prescribed by the Atlantic Area Parcel Grievance Committee, by virtue of its authority, as set forth in Article 7 of the Atlantic Area Parcel Agreement.

> On behalf of car washer William Mitchell, Union alleges violation of Article 45 (Supplement)—unjust discharge—and requests that grievant be reinstated with full back pay.

The undersigned further agree that a majority decision of the Joint Committee in the above dispute will be final, conclusive and binding with no appeal and, further, that neither party will attempt through any overt acts, to void the decision rendered.

The undersigned also agree that failure to comply with the decision of a majority of the committee within ten (10) days of the date of the decision will result in the loss of all contract rights, privileges and benefits due them under Article 7 of the Atlantic Area Parcel Agreement.

Date: 2-16-77

Employer: United Parcel Service, Inc.
Signed by: William Pastor
Title: District Manager
Local Union: 177
Signed by: Joseph Purcell
Title: Business Agent

DECISION

The panel in executive session, motion made, seconded and carried that the claim of the Union be denied and the discharge be upheld.

Frank Feely	Al Barlow
Employer Co-Secretary	*Union Co-Secretary*
2-16-77	2-16-77
Date	*Date*

AMENDED ANSWER OF DEFENDANT UNITED PARCEL SERVICE, INC.

(Filed October 11, 1978)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

78C. 1547 (CPS)

WILLIAM MITCHELL,

Plaintiff,

—against—

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177, AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

AMENDED ANSWER

Defendant UNITED PARCEL SERVICE, INC. (hereafter "UPS"), by its attorneys, Proskauer Rose Goetz & Mendelsohn, for its amended answer to the complaint herein, alleges:

1. Denies the allegations set forth in paragraph 1 of the complaint, except admits that plaintiff purports to invoke the jurisdiction of this Court under the statutory provisions cited.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2 of the complaint.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs 3, 7, and 8 of the complaint, except admits that plaintiff was employed by UPS from on or about May 18, 1964 until on or about January 13, 1977, and that he was employed full time as a car washer from on or about January 13, 1969 to the date of his discharge.

4. Denies the allegations set forth in paragraph 4 of the complaint, except admits that UPS maintains offices throughout the United States including an office at 643 West 43rd Street in the City, County and State of New York.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 5 of the complaint, except admits that the defendant Department Store and Wholesale Drivers, Warehousemen and Helpers, Local Union #177 (hereafter "Local #177"), is a labor organization.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 6 of the complaint.

7. Denies the allegations set forth in paragraph 9 of the complaint.

8. Denies the allegations set forth in paragraph 10 of the complaint, except admits that on January 13, 1977 plaintiff was discharged from UPS for dishonesty, stealing time and falsifying his time cards.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in para-

graphs 11 and 12 of the complaint, except admits that Local #177 did file a grievance on plaintiff's behalf.

10. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 13 of the complaint, except admits that the document annexed to the complaint as Exhibit B was submitted by Local #177 to a panel of the Atlantic Area Parcel Grievance Committee (hereafter the "Grievance Committee").

11. With regard to paragraphs 14, 15, and 16 of the complaint, insofar as the allegations refer to defendant UPS, denies said allegations.

12. Denies the allegations set forth in paragraph 17 of the complaint, except admits that a panel of the Grievance Committee heard Local #177's grievance over plaintiff's discharge, at Virginia Beach, Virginia on February 16, 1977, and voted to deny Local #177's grievance and uphold plaintiff's discharge.

13. With regard to paragraph 18 of the complaint, insofar as the allegations refer to defendant UPS, denies said allegations.

14. Denies the allegations set forth in paragraphs 19, 20, and 21 of the complaint.

15. With regard to paragraph 22 of the complaint, insofar as the allegations refer to defendant UPS, denies said allegations.

16. Denies the allegations set forth in paragraphs 23, 24, and 25 of the complaint.

17. With regard to paragraph 26 of the complaint, insofar as the allegations refer to defendant UPS, denies said allegations.

18. Denies the allegations set forth in paragraph 27 of the complaint.

19. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 28 of the complaint.

20. Denies the allegations set forth in paragraph 29 of the complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

21. The complaint fails to state a claim upon which relief can be granted against defendant UPS.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

22. Plaintiff's action against defendant UPS is barred by the applicable statute of limitations.

23. Based upon the foregoing, plaintiff is barred from seeking or receiving the relief demanded by the complaint.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

24. Plaintiff has failed to exhaust the available intra-union remedies within defendant Local #177 and defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

25. Based upon the foregoing, this Court lacks jurisdiction of this action, and plaintiff is barred from seeking or receiving the relief demanded by the complaint.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

26. Defendant UPS is, and at all times relevant to this action was, a party to a collective bargaining agreement with defendant Local #177.

27. Said collective bargaining agreement governs all the terms and conditions of employment of certain em-

ployees including all car washers at UPS' Staten Island, New York operating center—including the conditions pursuant to which defendant UPS may terminate employees and the manner or method pursuant to which disputes concerning such terminations shall be resolved.

28. On or about January 13, 1977, plaintiff was employed by defendant UPS as a car washer at the defendant's Staten Island, New York operating center. Accordingly, the terms and conditions of plaintiff's employment—including the conditions pursuant to which defendant UPS was entitled to terminate plaintiff and the manner or method pursuant to which any dispute concerning such termination was to be resolved—were governed by the collective bargaining agreement between defendant UPS and defendant Local #177.

29. The collective bargaining agreement provides that all disputes arising under the agreement, including disputes arising from defendant UPS' termination of plaintiff, shall be resolved in accordance with a grievance procedure, the results of which are final and binding upon defendant UPS and defendant Local #177 and upon employees such as plaintiff, employed by defendant UPS pursuant to the agreement.

30. Under the grievance procedure set forth in the collective bargaining agreement, disputes which UPS and Local #177 are unable to resolve are submitted to a panel of the Grievance Committee, which is comprised of three representatives of UPS and three representatives of the unions that subscribe to the Committee; but in no event may the panel that hears a particular grievance include any representative of UPS, or of a union, that is involved with the grievance. A decision by the panel majority is final and cannot be appealed further.

31. On information and belief, when plaintiff was notified of his impending termination, he advised defendant Local #177 of his claim or grievance that said termination by defendant UPS would be an alleged violation of the collective bargaining agreement. Following its receipt of such notification, defendant Local #177 processed and pursued plaintiff's claim or grievance by investigating the facts and circumstances leading to and the cause for plaintiff's discharge, and by meeting with defendant UPS. When it was unable to reach agreement with UPS on a resolution of plaintiff's grievance, Local #177 submitted the grievance to a panel of the Grievance Committee, which was scheduled to meet during the week of February 14, 1977 at Virginia Beach, Virginia.

32. A six-person panel of the Grievance Committee (whose three union members did not include any representative of Local #177), heard plaintiff's grievance on February 16, 1977. The panel then voted to deny the grievance and sustain plaintiff's discharge. Under the terms of the agreement, the panel's decision constituted a final and binding determination of plaintiff's claim or grievance that defendant UPS violated the collective bargaining agreement.

33. Based upon the foregoing, plaintiff is barred from seeking or receiving the relief demanded by the complaint.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

34. Defendant UPS repeats and realleges the allegations set forth in paragraphs 26 through 33, *supra*, with the same force and effect as if more fully and completely set forth herein.

35. The exclusive method by which any dispute arising from or in connection with defendant UPS' termination of plaintiff is to be resolved is in accordance with

the grievance procedures set forth in the collective bargaining agreement.

36. Based upon the foregoing, this Court lacks jurisdiction of this action and plaintiff is barred from seeking or receiving the relief demanded by the complaint.

WHEREFORE, defendant UPS demands judgment dismissing the complaint, together with costs, disbursements and attorney's fees of this action, and respectfully requests that this Court grant defendant UPS such further relief as it may deem just and proper.

PROSKAUER ROSE GOETZ & MENDELSOHN
By /s/ HOWARD L. GANZ
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AMENDED ANSWER OF DEFENDANTS DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177 AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

(Filed February 9, 1979)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 78 Civ. 1547 (CPS)

WILLIAM MITCHELL,

Plaintiff,

v.

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendant.

AMENDED ANSWER ON BEHALF OF LOCAL UNION NO. 177, I. B. T.

Defendant Local Union No. 177 (hereinafter referred to as defendant local union) by way of Answer to the complaint herein says:

1. Defendant local union denies the allegations contained in paragraph 1.

2. Defendant local union admits the allegations contained in paragraph 2.

3. Defendant local union admits the allegations contained in paragraph 3 up to March 28, 1977.

4. This defendant does not have such knowledge.

5. Defendant local union admits the allegations contained in paragraph 5.

6. Defendant local union admits the allegations contained in paragraph 6.

7. Defendant local union admits the allegations contained in paragraph 7 as far as up to February 13, 1977.

8. Defendant local union admits the allegations contained in paragraph 8.

9. Defendant local union denies the allegations contained in paragraph 9. This is specifically provided to the opposite of this paragraph of the complaint by the collective bargaining agreement.

10. Defendant local union admits the allegations contained in paragraph 10.

11. Defendant local union denies the allegations contained in paragraph 11. At one time plaintiff said that some of the company allegations were false and at another occasion he said they were true.

12. Defendant local union admits the allegations contained in paragraph 12 and states the local union did so.

13. Defendant local union denies the allegations contained in paragraph 13. The union did not admit wrong doing, did not act perfunctorily but did argue that even if an employee were guilty of the offenses charged, the penalty was too severe. The local union acted in good faith, in compliance with its regular procedures.

14. Denied. The Atlantic Area Grievance Committee which is set up by a collective bargaining agreement covering much of the United States East Coast and many local unions set its meetings and meeting places. Such

meetings have never been held in New York or New Jersey, but usually in D. C., Virginia, Pennsylvania, Maryland, South Carolina or North Carolina. This defendant local union followed its duty and usual practice by notifying plaintiff by telegram. The invariable practice of this defendant local union is that all grievants must pay their own way; some have chosen to do so and some have not.

15. Defendant local union denies paragraph 15. Plaintiff has never mentioned any witnesses to this defendant but did say he did not have the funds for the trip.

16. Defendant local union denies paragraph 16. Plaintiff never mentioned getting time to get the funds and never requested a move of the hearing site, which cannot be done anyway; at the panel sessions, grievances are heard from the entire "Atlantic" area.

17. Defendant local union denies paragraph 17. This defendant took the position that the discharge was improper and presented plaintiff's sworn statement which was voluntarily prepared and submitted by plaintiff.

18. Defendant local union denies paragraph 18.

A. Defendant local union denies subparagraph A. Plaintiff denied and admitted company allegations on different occasions. Defense was not perfunctory but plenary and in good faith and in such a manner as this defendant felt would likely produce the best results for plaintiff in view of the nature, quality and quantity of the case against plaintiff.

B. Defendant local union denies subparagraph B.

C. Defendant local union denies subparagraph C.

19. Defendant local union denies the allegations of paragraph 19. This is a frivolous and false allegation.

Collective bargaining agreements are required by law and practicality and so are grievance procedures. It is denied that there is any tradition of seeking redress for discharge from employment in court; on the contrary, contracts with grievance procedures are traditional.

20. Defendant local union denies paragraph 20. As a matter of fact, an agent of this defendant offered to get plaintiff another job and plaintiff refused the offer. This defendant has successfully done this for many other discharged employees.

21. Defendant local union denies paragraph 21.

22. This defendant local union answers as above.

23. Defendant local union has no such knowledge and therefore denies paragraph 23.

24. Defendant local union has no such knowledge and therefore denies paragraph 24.

25. Defendant local union denies paragraph 25.

26. Answered as above.

27. Defendant local union has no such knowledge and therefore denies paragraph 27.

28. Defendant local union denies paragraph 28.

29. Defendant local union denies paragraph 29.

First Affirmative Defense

30. The Complaint fails to state a cause of action.

Second Affirmative Defense

31. Plaintiff has failed to exhaust available internal remedies within Local 177 and the International Union.

WHEREFORE, defendant Local Union No. 177 demands judgment in favor of Local 177, I. B. T. against plaintiff.
Dated: New York, New York

January , 1979

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By .....
(A Member of the Firm)

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Attorneys for Defendant
Department Store and Wholesale
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Local Union 177

NOTICE OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF THE DEFENDANT UNITED PARCEL SERVICE, INC.
(Filed June 11, 1979)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 C. 1547 (CPS)

WILLIAM MITCHELL,

Plaintiff,

—against—

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177, AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the annexed Statement Pursuant to General Rule 9(g) and Affidavit of James Kilkenny and exhibits thereto, sworn to June 4, 1979, and upon the accompanying Memorandum of Law, defendant United Parcel Service, Inc. will move this Court before the Honorable Charles P. Sifton, on Wednesday, June 20, 1979, at 4:00 p.m., or as soon thereafter as counsel may be heard, in Courtroom 4 of the United States Courthouse, 225

Cadman Plaza East, Brooklyn, New York, for an order, pursuant to Rules 12(b) and 56 of the Federal Rules of Civil Procedure, dismissing the complaint and/or granting summary judgment in defendant's favor, for an award of the costs and reasonable attorneys' fees incurred by defendant on this motion, and for such other, further, and additional relief as to this Court may seem just and proper.

Dated: New York, New York
June 4, 1979

Yours, etc.
PROSKAUER ROSE GOETZ & MENDELSOHN

By /s/ M. DAVID ZURNDORFER
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Drivers, Warehousemen and
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DEFENDANT UNITED PARCEL SERVICE, INC.'S 9(g) STATEMENT IN SUPPORT OF SUMMARY JUDGMENT MOTION DATED JUNE 4, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 C. 1547 (CPS)

WILLIAM MITCHELL,

Plaintiff,

—against—

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177, AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

STATEMENT PURSUANT TO
GENERAL RULE 9(g)

Defendant United Parcel Service, Inc. ("UPS") contends that there is no genuine issue to be tried with respect to the following material facts:

1. Plaintiff was employed by UPS as a car washer at the Staten Island Center.

2. Plaintiff was discharged from UPS on January 13, 1977, at a hearing in which plaintiff, union representatives, and company representatives were present. Plaintiff was

informed at the hearing that he was being discharged for his dishonest acts of stealing time and falsifying his time cards on numerous observed occasions. At the time of his discharge, plaintiff was aware that there would be a hearing before the Joint Panel of the Grievance Committee concerning his discharge.

3. The terms and conditions of plaintiff's employment—including the conditions pursuant to which defendant UPS was entitled to terminate plaintiff's employment and the procedures by which any dispute concerning such termination was to be resolved—were governed by the collective bargaining agreement between UPS and Local Union #177.

4. Pursuant to the collective bargaining agreement, plaintiff's grievance over his discharge was submitted to a Joint Union-Management Panel of the Grievance Committee. Pursuant to the established practice under the collective bargaining agreement, plaintiff received a telegram on February 14, 1977, confirming that the hearing would be held in Virginia Beach, Virginia on February 16, 1977, and that he could attend if he assumed his own expenses.

5. The location of the hearing at Virginia Beach was the result of the customary rotation of panel locations. The panel serves employees in widely distant parts of the eastern United States. Plaintiff's grievance was only one of a number from various states heard on February 16, 1977 at Virginia Beach. Panel locations are selected by the co-secretaries of the Joint Panel to accommodate people from these distant areas.

6. At the hearing Company and union representatives submitted documented testimony and exhibits concerning plaintiff's discharge, including a statement setting forth

the numerous observed instances of plaintiff's dishonesty and irresponsibility, and a statement written by plaintiff denying all of the Company's allegations. The union representative also argued in plaintiff's defense that, even if plaintiff had committed the alleged offenses, the penalty of discharge was too severe, and a suspension would be more appropriate.

7. The Joint Panel decided on February 16, 1977, to uphold plaintiff's discharge. Pursuant to the collective bargaining agreement, that decision of the Joint Panel is final and binding.

8. The instant lawsuit was commenced by plaintiff on July 20, 1978, more than seventeen months after the decision of the Joint Panel.

9. Prior to commencing this lawsuit, plaintiff did not pursue or exhaust the intra-union remedies provided for in and made mandatory by his union constitution.

Dated: New York, New York
June 4, 1979

Respectfully submitted,

PROSKAUER ROSE GOETZ
& MENDELSOHN

By /s/ M. DAVID ZURNDORFER
Attorneys for Defendant
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300 Park Avenue
New York, New York 10022
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AFFIDAVIT OF JAMES KILKENNY SWORN TO JUNE 4, 1979 IN SUPPORT OF SUMMARY JUDGMENT MOTION AND EXHIBITS ANNEXED THERETO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

78 C. 1547 (CPS)

WILLIAM MITCHELL,

Plaintiff,

—against—

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177, AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

KILKENNY AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES KILKENNY, being duly sworn, deposes and says:

1. I am employed by United Parcel Service, Inc. ("UPS" or the "Company") as Division Manager. I make this affidavit in support of defendant UPS's motion for dismissal of the complaint and/or for summary judgment.

2. This is an action for breach of the duty of fair representation brought by William Mitchell, who was employed by UPS as a car washer at the Staten Island Center

(the "center" or "building"). Mr. Mitchell claims that Local Union #177's alleged misconduct in the prosecution of his grievance before the Joint Panel of the Joint Atlantic Area Parcel Grievance Committee (the "Joint Panel") entitles him to a judgment that would vacate the final and binding decision of the Panel and restore to Mitchell his employment with UPS. Because of my position as Division Manager, I am aware of the circumstances which led UPS to terminate Mr. Mitchell's employment and of the procedures that were utilized in accordance with the collective bargaining agreement to resolve Mr. Mitchell's grievance following the termination of his employment.

3. Mr. Mitchell was discharged from UPS on January 13, 1977, for his dishonest acts of "stealing time" * and falsifying his time cards. He was discharged after he had been observed by numerous Company supervisors on a total of six separate occasions leaving or being otherwise absent from his job hours prior to its completion. Although on each such occasion Mr. Mitchell worked considerably less time than was required, he always turned in a falsified time card indicating that he had worked even longer than the regularly scheduled shift, and, therefore, that he was entitled to overtime pay.

4. I was informed by my supervisors of each observed instance when Mr. Mitchell failed to complete his regularly scheduled work day and yet submitted a time card for the day claiming entitlement to pay for hours he had not worked. I have personally checked Mr. Mitchell's time cards for these days and have confirmed that he has falsely claimed that he had completed his regular shift and worked overtime on those dates; and that he had claimed to be entitled to many dollars in regular and overtime pay for work that he had not performed. When Mr. Mitchell's

* "Stealing time" means to procure payment for time not worked.

grievance over his discharge was submitted to the Joint Panel pursuant to the grievance procedure, I submitted on the Company's behalf a statement setting forth in detail the instances of Mr. Mitchell's observed dishonest conduct. This statement was received in evidence by the Joint Panel, and a copy of the statement is attached as Exhibit A.

5. For example, on July 2, 1976, when plaintiff was scheduled to work an 8-hour shift ending at 3:00 a.m., he was observed leaving the building at 12:45 a.m. Although he did not return to the building that night, plaintiff submitted a time card claiming that he had punched out at 4:15 a.m. and thus was entitled to his regular pay plus one-and-one-quarter hours overtime. Again on July 7, 1976, two supervisors observed plaintiff departing from the building at 1:33 a.m. and not return. One supervisor watched the center's only time clock from 3:35 until 5:00 a.m., making certain that plaintiff did not punch the clock during that period. Yet plaintiff subsequently submitted a time card showing a punch-out time of 4:09 a.m., and thus claiming an hour and nine minutes in overtime pay. Similar incidents occurred on June 16, June 18, June 29, and July 8, 1976. On each occasion, plaintiff left the building an hour or more before the end of his regular shift and then submitted a time card claiming that he had worked a full shift plus overtime.

6. The numerous instances of dishonesty set forth in Exhibit A, observed by seven different UPS supervisors and managers, convinced me that Mr. Mitchell was not a person whom UPS should retain in its employ. I scheduled a meeting for the evening of July 14, 1976 to review the situation with Mr. Mitchell and his union representatives and to terminate his employment. However, this hearing had to be postponed when, on the morning of July

14, 1976, Mr. Mitchell claimed that he had injured his back while working. It should be noted that there was no witness to the claimed accident. (See the copy of the Employee Occupational Injury Or Illness Report attached as Exhibit B.) For the next five months, Mr. Mitchell did not report to work but instead collected Worker's Compensation benefits. (Tr., pp. 50-59.) *

7. Finally, I was able to hold the hearing at the Staten Island Center on January 13, 1977. Present at the hearing were Mitchell, Local Union #177 officials Joseph Purcell and Donald Mason, Shop Steward Harry Stanley, several Company supervisors, and myself. I reviewed with Mr. Mitchell his numerous dishonest acts of stealing time and falsifying time cards. After hearing and considering the union's arguments on Mr. Mitchell's behalf, I then informed Mr. Mitchell that his dishonest and irresponsible behavior necessitated that we terminate his employment with UPS. A letter to Mr. Mitchell from myself, dated January 28, 1977, reviewing the events of this hearing and confirming the termination of his employment with UPS, is attached as Exhibit C. Mr. Mitchell has subsequently stated at his deposition, held on January 16, 1979, that he was well-represented by the union at this hearing (Tr., p. 69.).

8. Pursuant to the grievance and arbitration provisions of the collective bargaining agreement, the relevant provisions of which are attached as Exhibit D, Mr.

* Mitchell also requested and secured Worker's Compensation benefits for the 4½ weeks between the date of his discharge and the date of the Joint Panel hearing. A copy of the Workmen's Compensation Board Notice of Decision is attached as Exhibit I. Since, as plaintiff himself has conceded, he was not disabled during that period and was not working solely because of his discharge (Tr., pp. 126-30), he was not entitled to any such compensation.

Mitchell's grievance over his discharge was processed by his local union to the Joint Panel of the Atlantic Area Parcel Grievance Committee. All of the procedures that were followed concerning the processing of Mr. Mitchell's grievance were completely non-discriminatory and evidence a total lack of any animus against him.

9. With respect to the notification procedures followed, plaintiff received as much notice of his hearing before the Joint Panel as have other grievants under the collective bargaining agreement. In no way was Mr. Mitchell singled out for any irregular or discriminatory notification of his pending hearing. At his deposition, Mr. Mitchell testified that he knew on January 13, 1977, that there was going to be a hearing before the Joint Panel. (Tr., pp. 91-92.) The hearing was not held until thirty-three (33) days later. He also testified at his deposition that he had received a telegram on February 14, 1976, confirming that there would be a hearing of his case on February 16th before the Joint Panel, and that he could attend if he wished to assume his own expenses. (Tr., p. 95.) This was the regular procedure followed in every grievance hearing in my experience under the terms of the collective bargaining agreement in effect between the parties. Moreover, the location of the hearing at Virginia Beach, Virginia was solely the result of the customary rotation of panel locations. The Joint Atlantic Area Parcel Grievance Committee serves employees in widely distant parts of the eastern United States. Thus, the panel locations are selected by the co-secretaries of the Joint Panel to accommodate people from these distant areas. This location was not chosen to discriminate in any way against Mr. Mitchell. His grievance was only one of a number from various states being heard that day in Virginia Beach; indeed, the grievance immediately preceding his own was filed by an employee located in South Carolina.

10. The procedures followed at the February 16th hearing were entirely in accordance with the established procedure of the parties in proceedings before the Joint Atlantic Area Parcel Grievance Committee. In accordance with that procedure, which requires that the Company present its case first, I submitted copies of the statement (referred to above, and annexed as Exhibit A) setting forth in detail the instances of Mr. Mitchell's observed dishonest conduct. Mr. William Pastore, UPS's District Manager, informed the Panel that we had for their inspection the time cards at issue, and notarized statements from each of the seven supervisors who had observed Mr. Mitchell's dishonest acts.

11. Plaintiff was represented before the Joint Panel by Joseph Purcell, the Business Agent of Local Union #177. Mr. Purcell submitted in plaintiff's defense a notarized statement prepared by Mr. Mitchell himself, denying all of the Company's allegations. A copy of that statement is attached as Exhibit E. In addition, the union representative urged the Joint Panel to consider the possibility of suspension rather than discharge as an appropriate remedy. Given the obvious persuasiveness of the Company's submission to the Joint Panel—including the large number (7) of witnesses who had observed one or more of Mr. Mitchell's dishonest acts, and the large number of separate incidents of dishonesty (6) that had been observed—it was, in my judgment, certainly reasonable for Mr. Purcell to believe that he might have a better chance to secure a reduction in the severity of discipline than to hope for an all-out victory. Nor, based upon my experience, was this an unusual position for a union representative—faced with a persuasive case of serious misconduct—to take.

12. At no time prior to the commencement of this lawsuit in July 1978, did plaintiff give any indication that

he was dissatisfied by the manner in which Mr. Joseph Purcell and Local Union #177 represented him before the Joint Panel. Indeed, in a letter mailed by plaintiff to Frank Fitzsimmons, the General President of the international union, subsequent to the hearing, plaintiff complimented Joseph Purcell and his other union representatives and wrote:

> "Local#177 to which i've been a member of for 13 years has done a excellent job in protecting my rights under the contract.
>
> Joe Purcell and Donald Mason B. A.'s for the local have done a tremendous job in my behalf."

A copy of this letter is attached as Exhibit F.

13. I was present at the Joint Panel hearing and know of no basis for any claim that there was anything unfair or discriminatory in the manner in which it was conducted. The six-person panel of the grievance committee heard all the evidence and argument from both sides, asked questions, and then reserved judgment. The following day the Panel announced its decision upholding the Company's discharge of Mr. Mitchell. A copy of the Joint Panel's decision is attached as Exhibit G. That decision is final and binding under the terms of the collective bargaining agreement.

14. Subsequent to the Joint Panel's decision, Mr. Mitchell made no use of the appellate procedures contained in the union constitution which have been designed for the purpose of remedying an alleged case of unfair representation. These procedures are spelled out in the Teamster's Constitution, Article XIX, which is attached as Exhibit H. The procedures provide for a grievant to protest the Local Union's handling of his case by filing a complaint with the Local Union Executive Board and, if

unsuccessful, by filing an appeal to the Union Joint Council and its Executive Board. Further appeals may be taken to the General Executive Board of the International Union and, ultimately, to the International Convention. Counsel has informed me, as defendant UPS's Memorandum of Law shows on pp. 28-30, that these very procedures of the Teamster Constitution have been consistently upheld by the courts and have been found to provide adequate provisions for internal relief. The union constitution provides that these intra-union remedies must be exhausted before a grievant can resort to litigation. Nevertheless, Mr. Mitchell has completely ignored these procedures prior to commencing the instant lawsuit.

15. Without using, let alone exhausting, the intra-union remedies provided for in his union constitution, Mr. Mitchell commenced the instant lawsuit seventeen months after the decision of the Joint Panel upholding his discharge. Counsel has informed me, as defendant UPS's Memorandum of Law shows on pp. 7-11, that the applicable statute of limitations bars the instant lawsuit because it was commenced by plaintiff more than ninety days after the Joint Panel's decision.

WHEREFORE, it is respectfully requested that defendant's motion be granted in all respects.

/s/ JAMES KILKENNY
James Kilkenny

Sworn to before me this 4th day of June, 1979.

/s/ L. ROBERT BATTERMAN
Notary Public
L. ROBERT BATTERMAN
Notary Public, State of New York
Qual. in N. Y. Co. No. 60-0189810
Commission Expires March 30, 1981

Exhibit A

William Mitchell has been employed by United Parcel Service since May 18, 1964.

On Thursday, January 13, 1977, he was discharged from United Parcel Service for his dishonest acts of stealing time and falsifying his time cards.

During his employment, William Mitchell has been a package driver, preloader, and at the time of his discharge, a car washer at our Staten Island, New York operating center. His scheduled start time is 6:30 P. M., he gets a half hour for lunch and his scheduled 8 hours are up at 3 A.M.

The events leading up to his discharge are significant and bear repeating in that they show a clear pattern of his total disregard for his responsibilities as an employee.

Not once, but on seven separate occasions, Bill Mitchell was observed by company supervisors leaving his job several hours prior to its completion. On each instance he turned in a time card showing in fact that he had worked 8 hours or longer.

Our first indication that he was not completing his assigned work day occurred on Wednesday, June 16, 1976.

On that date, Ed Schmidl, shop supervisor, arrived at the Staten Island Center at 1:55 A. M. to work with the mechanic, Steve Giglio. When he arrived, there were four employees in the Center. Bill Mitchell was not there. Ed remained in the Center until 11:00 A. M. in the morning. Ed did not see Bill Mitchell at any time while in the Center. Yet Bill Mitchell's time card for that day showed he started work at 6:30 P. M. and finished at 3:43 A. M. Mitchell was paid for 8.72 hours of work. Ed Schmidl reported what he had observed to Center Manager Lou Pillarella and told Lou he was coming back to work with the mechanic on 6/18/76 and would check on William Mitchell's presence on the job.

On Friday, June 18, 1976, Ed Schmidl arrived at the Staten Island Center at 2:15 A. M. Upon entering the building, Ed checked it completely. William Mitchell was not there. Ed Schmidl observed the time clock until 4:30 A. M. and saw seven men use it. At no time did he see William Mitchell in the center or use the time clock. William Mitchell's time card showed a punch out time of 4:04 A. M. Mitchell was paid for 9.06 hours of work.

On Monday, June 28th at 11:00 P.M., Ken Kett, Loss Prevention Supervisor, and Kenilworth supervisor Nick Melillo arrived at the Staten Island Center. At 12:45 A. M. on June 29th, they observed Bill Mitchell leave the building. They followed Bill to his home on Woolley Avenue, which he entered. They then returned to the Staten Island Center and observed the building until 4:30 A. M. Bill Mitchell never returned to the building. He turned in a time card with a punch out time of 4:15 A. M. and was paid for 9.24 hours.

On Tuesday, June 29, Bill's time card showed a punch in date of June 29 at 6:16. His time card also showed a punch out date of June 29, 4:27 A. M. Brian Flynn saw Bill Mitchell arrive at the Staten Island Center at 6:45 P. M. on June 29 but Bill's time card as indicated above showed a punch in time of 6:16 P. M.

On July 1st at 10:00 P. M., Nick Melillo and Ray Zienowicz arrived at the Staten Island Center. Bill Mitchell's car was not at the center. At 10:35 P. M., Nick Melillo entered the building and completely inspected it. Bill Mitchell was not in the building. At 11:30 P. M. they both observed Bill Mitchell return to the building. At 12:45 A. M. on July 2, 1976, they both observed Bill Mitchell leave the Staten Island building. They watched the building until 4:20 A. M. and never saw Bill Mitchell return. At 4:30 A. M. they drove past Bill Mitchell's house and his car was parked there. Bill Mitchell turned in a

time card with a punch out time of 4:15 A .M. and was paid for 9.25 hours.

On Tuesday, July 6th between 9:00 and 9:05 P. M., supervisor Brian Flynn and Loss Prevention supervisor Ray Zienowicz arrived at the Staten Island Center. Bill Mitchell's car was not on the property. At 9:30 P. M. they observed Bill Mitchell's car parked in front of his home. They both returned to the Staten Island Center and saw Bill Mitchell return to the building at 10:50 P. M. At 1:33 A. M., July 7th, they observed Bill Mitchell leave the building in his car. At 1:50 A. M., Brian Flynn went past Mitchell's house and saw his car there. He then returned to the center and Ray Zienowicz and himself watched the building until 3:30 A. M. Between 3:30 and 3:35 A. M., Brian Flynn entered the building and Steve Giglio, the mechanic, was the only one inside. Flynn observed the time clock until 5:00 A. M. The only people to use the clock were the four night men. Bill Mitchell turned in a time card with a punch out time of 4:09 A. M. Mitchell was paid for 9.09 hours.

Once again, on Wednesday, July 7th, Brian Flynn and Ray Zienowicz were at the Staten Island Center at 9:00 P. M. At 12:24 A. M. on July 8, 1976, they both observed Bill leave with his car. They watched the building until 3:30 A. M. At that time, Ray Zienowicz drove to Bill Mitchell's home and saw his car parked in front of his home at 3:30 A. M. At 3:30 A. M. Brian Flynn entered the Staten Island building and observed the time clock until 5:00 A. M. The only people to use the clock were three night men. The fourth night man was late and Brian signed him in at 4:20 A. M. Bill Mitchell turned in a time card with a punch out time of 4:24 A. M. and was paid for 9.28 hours.

On Thursday, July 8th, at 5:57 P. M., John Burnetsky, the District Auditor, who was working in the center for

the day, observed Bill Mitchell punch a time card to start work. At 9:00 P. M. Ken Kett, Lou Pillarella and Ray Zienowicz arrived at the Staten Island Center. Between 9:55 and 10:00 P. M. they observed Bill Mitchell leave the building in his car. They drove to Mitchell's house where he arrived at 10:20 P. M. They then returned to the Staten Island Center. At 11:30 P. M. Mitchell returned to the Center. At 12:25 A. M. on July 9th, Bill Mitchell left the building and started to drive away. At that time, he was confronted by Lou Pillarella and Ken Kett. When asked where he was going, Bill Mitchell replied, to lunch. He was then asked where he had been from 9:55 to 11:30. He replied he had gone home for an emergency. Center Manager Lou Pillarella then asked to see his time card. Bill handed him a card with just a punch out time of 12:35 on it. He asked Bill why he had not punched in, he said he forgot. Lou told Bill that was strange inasmuch as John Burnetsky had observed him punch in at 5:57 P. M. Lou also told Bill that he knew what Bill had been doing and what had been going on. To this Bill answered that he was going home sick. Lou informed him that he was going to be put on a notice of discharge for dishonesty. He then started his car and left.

At this point, it must be pointed out and already is quite obvious that on seven known occasions, Bill Mitchell left work early and was paid for work he did not perform. He falsified his time cards in order to conceal his activities and to receive unearned pay.

It bears further mentioning that Bill Mitchell's actions were not those of a responsible employee.

At the local hearing held for Bill Mitchell, all of the facts surrounding the incidents were reviewed with him. When asked specific questions as to his activities on the dates in question, Bill commented that none of the facts were true. He further commented that we were out to get him because he was a long seniority employee.

As a result of Bill Mitchell's dishonest acts of stealing time and falsifying his time cards, and because he could not or would not explain his actions, Bill Mitchell was discharged from our employ. (Exhibit I).

As a company we must place our trust in all of our employees.

They are entrusted with large sums of money, and pick up, sort and deliver parcels with high value. Due to the nature of our business, many of our employees spend most of their work day without direct supervision.

When any employee violates this trust by committing dishonest acts, we must deal quickly and severely with that person.

Such was the case with Bill Mitchell.

Bill Mitchell's actions were not those of a responsible employee and constitute a clear dereliction of his duties as an employee.

We must again repeat that not once but on seven known occasions he was observed stealing time. He tried to conceal his acts by keeping two sets of books, so to speak. It is evident Bill Mitchell found some way to tamper with the time clock in order to falsify his time cards and collect unearned pay.

If we were to condone this type of behavior from Bill Mitchell or any other employee, the fact remains quite clear that our ability to remain in business would be severely challenged. It is further obvious that the jobs of our other employees would be placed in jeopardy.

We had no choice in this matter but to discharge Bill Mitchell.

He has no one to blame but himself in this case.

Based on all of the facts presented, we respectfully submit that the claim of the grievant be denied and that his discharge be upheld.

EMPLOYEE OCCUPATIONAL INJURY OR ILLNESS REPORT

United Parcel Servic

Employee

FIRST NAME: William | INITIAL: T. | LAST NAME: Mitchell

ADDRESS: 431 Woodley Ave.

CITY & STATE: Staten Island N.Y. | ZIP CODE: 10314 | TELEPHONE (Area) 212 (No.) 698-8275

SOCIAL SECURITY NUMBER: 062 30 0260 | ☒ MALE ☐ FEMALE | ☐ SINGLE ☒ MARRIED | NUMBER OF DEPENDENTS: 4

DATE OF BIRTH: 2/16/39 | DATE OF EMPLOYMENT: 12-7-73 | WAGES: Per Day $ ____ Per Hour $ 6.67

REGULAR OCCUPATION: Pkg Wagon | OCCUPATION AT TIME OF INJURY OR ILLNESS: Package car

For Office Use Only

U.P.I. REPORT NUMBER: C607014

INSURANCE COMPANY FILE NUMBER:

DISTRICT NUMBER:

CENTER DEPT. LOCATION NO.:

INJURY OR ILLNESS CODE NUMBER: 11

BODY PART CODE NUMBER: 5

Accident or Exposure

WHERE DID INJURY OR ILLNESS OCCUR? (Specify in center, etc., or address if not U.P.S. property) Inside building U.P.S. property 1321 Travis Ave. S.I. N.Y. 10314.

HOW DID INJURY OR ILLNESS OCCUR? (Describe fully) Checking oil in truck #55507 slipped on stuff on floor exiting truck falling + the ground substaining back injuries

WHAT WAS EMPLOYEE DOING WHEN INJURED? (Be specific) Exiting truck, slipped and falling to the ground

NAME OBJECT OR SUBSTANCE WHICH DIRECTLY INJURED THE EMPLOYEE: Floor of Building

Date of Injury: 7/14/76 | Time of Injury: 12:15 ☐ AM ☒ PM | Starting Time Day of Injury: 11:30 ☐ AM ☒ PM | Was Employee Paid for Full Day: Yes | Date Disability Began: / /

WHEN AND TO WHOM WAS INJURY REPORTED? Reported to Supervisor who reported it to Pillow

WITNESSES: Name & Address: None.

Nature

☐ Head ☐ Eyes ☐ Trunk Middle Back ☐ Arms Both | ☐ Hands ☐ Legs ☐ Toes ☐ Internal | ☒ Wounds ☒ Strain & Sprain Middle Back ☐ Hernia ☐ Fracture | ☐ Dog Bite ☐ Burns ☐ Foreign Body ☐ Skin | ☐ Death ☐ Lost Time ☐ Medical Treatment Only | ☐ Delayed Medical Treatment

DESCRIBE INJURY OR ILLNESS (Specify right, left, etc.): Strain of middle Back

Medical Treatment

BY	Name	Address	Telephone Number
HOSPITAL			
HOSPITAL			
DOCTOR	D. Agnifredda	212 Cromwell Ave S.I. N.Y.	YU-7-4805
DOCTOR			

HAS EMPLOYEE RETURNED TO WORK: No | DATE RETURNED: / /

REMARKS: Employee injury was reported to Walter Pillow, Supervisor. Walter and Bill Pillow the only employees in the building at the time of injuries. Supervisor came in the next day to Bill's residence.

As certified that the above statements are true:

Date 7/14/76 CENTER St. Island EMPLOYEE'S SIGNATURE William Mitchell

Date 7/14/76 CENTER St. Island CENTER MANAGER Bill Pillow

DISTRICT ADDRESS

EXHIBIT B

Exhibit B

A53

Exhibit C

January 28, 1977

Mr. William Mitchell
431 Woolley Avenue
Staten Island, New York 10314

Dear Mr. Mitchell:

A meeting was held in the Staten Island Center on January 13, 1977. Present were you, Local 177 officials Joe Purcell and Don Mason, shop steward Harry Stanley, Ray Cooper, Lou Pillerella, Nick Melillo, Brian Flynn and myself.

The purpose of the meeting was quite specific. We reviewed with you the fact that on numerous instances, you were observed leaving the job prior to the completion of your work day. In an effort to conceal this, you falsified your time cards. Your acts were ones of dishonesty and constitute a complete dereliction of your responsibilities as an employee.

When confronted with these facts you denied them completely and your only explanation was that the charges against you were lies and we were out to get you. You made these comments in spite of the fact that several supervisors observed you on different occasions leaving the job.

We mentioned that we could not tolerate dishonesty from any of our employees.

As a company, we provide you with substantial wage and fringe benefits. For these benefits, we expect that all of our employees be honest with us and provide us with a fair days work.

We made it quite clear to you that you have left us no choice in this matter. Your dishonest acts cannot be tol-

PREVIOUS PAGE WAS BLANK

erated by United Parcel Service. Based on all these facts presented at this meeting, we have no choice but to discharge you from our employ.

Very truly yours,

UNITED PARCEL SERVICE
JIM KILKENNY
Jim Kilkenny
DIVISION MANAGER

JK/vac

cc: B. Pastor
J. Kilkenny
Local #177
Personnel

Exhibit D

UNITED PARCEL SERVICE

EASTERN STATES IBT

AREA AGREEMENT

December 9, 1976

Article 6

Grievance Procedure

Section 1—*No Strikes—No Lockouts*

The Union and the Employer agree that there shall be no strike, picketing, lockout, tie-up, or legal proceedings without first using all possible means of a settlement, as provided for in this Agreement or any Supplement hereto, of any controversy which might arise under this Agreement. The parties further agree that the words "legal proceedings" as used in this paragraph shall not be construed to prohibit the Union or the Employer from going to court of proper jurisdiction for an injunction against the other for breach of the no-strike, no lock-out, no tie-up, no picketing promises made herein.

Section 2—*Grievances*

A grievance is hereby jointly defined to be any controversy, complaint, misunderstanding or dispute arising as to interpretation, application or observance of any of the provisions of this agreement or Supplements hereto.

Grievance procedures may be invoked only by authorized Union representatives.

In the event of a grievance, it shall be handled in the following manner.

(a) The employee shall report it to his shop steward in writing within five (5) working days. The steward shall attempt to adjust the matter with the supervisor within forty-eight (48) hours.

(b) Failing to agree, the shop steward shall promptly report the matter to the Union which shall submit it in writing and attempt to adjust the same with the Employer within five (5) days.

(c) If the parties fail to reach a decision or agree upon a settlement in the matter, it shall be submitted in writing within ten (10) working days unless otherwise mutually agreed, to:

(1) The appropriate Local Parcel Grievance Procedure as set forth in each supplement if it is a grievance relating to a Supplemental Agreement or a matter not relating to the interpretation or application of the Area Agreement or appeal from discharge or suspension.

(2) The Eastern States Area Parcel Grievance Committee as set forth in Section 5 (hereinafter referred to as the ESAPGC) if it is a grievance relating to the interpretation or application of the Area Agreement.

(3) In the event there is a dispute as to whether a grievance should be heard by the Local Procedure or the Area Committee, the matter shall be referred to the Area Committee for a determination of which committee has jurisdiction.

Section 3—*Eastern States Area Parcel Grievance Committee*

A. The ESAPGC shall be composed of the UPS representatives and the Union representatives who served on the Negotiating Committee or their replacements as may be agreed upon by the Negotiating Committee.

B. The expenses incurred by the ESAPGC shall be borne equally on a pro rata basis by all the Local Unions having cases docketed on the agenda and UPS operations which are covered by this Agreement.

C. In order that ESAPGC may operate quickly and efficiently, the parties agree that a person who may or may not be a member of the ESAPGC shall be mutually selected and designated to serve as Secretary. The Secretary, if not a member of the ESAPGC, shall have no voice in making decisions and shall perform only the duties assigned to him by the ESAPGC. The Secretary shall docket cases, prepare the agenda and mail all copy prior to the scheduled meeting of the ESAPGC to each member of the Committee and the Employer. The Secretary shall attend the meetings to prepare and keep the minutes and mail copies of the minutes to the members of the ESAPGC and shall also mail copies of the decisions of the ESAPGC to all UPS representatives and Local Unions who are parties to this Agreement.

D. A grievance to be heard by the ESAPGC must be put in writing and submitted to the Secretary ten (10) days before the meeting of the ESAPGC. The parties further agree that no grievance or grievances shall be discussed except those which have been received by the Secretary of the ESAPGC before the ten (10) days prior to the date of the meeting. It is agreed that there shall be an equal number of representatives of the Unions and UPS on each panel that hears a case. The members of the panel are to be selected from the overall ESAPGC. The decision of the majority of the panel hearing the case shall be binding on all parties.

E. It is understood and agreed that the UPS representatives and the Local Union representatives of the ESAPGC representing the UPS operation and/or Local Union involved in a proceeding before the panel will be ineligible to act as a member of the panel during the proceeding.

Section 4—*Arbitration—ESAPGC*

If any grievance or dispute cannot be satisfactorily settled by a majority decision of the panel of the ESAPGC,

then the grievance may be submitted to the Permanent Arbitrator, established in accordance with the ESAPGC Rules of Procedure, by either or both parties within five (5) days. It is agreed that the arbitrator is empowered to hear and decide the deadlocked case even if only one of the parties submits to arbitration or if one of the parties fails to appear at the hearing or to present evidence. The arbitrator shall have the authority to apply the provisions of this Agreement and to render a decision on any grievance coming before him, but shall not have the authority to amend or modify this Agreement or establish new terms and conditions under this Agreement. The cost of the arbitration shall be shared equally by the parties. The decision of the arbitrator shall be final and binding on the parties and the employees involved. In the event that the losing party fails to abide by the arbitrator's decision or that either party refuses to submit to his jurisdiction, the other party shall have the right to take all legal or economic recourse. The ESAPGC or the arbitrator shall have the authority to order full, partial or no compensation for time lost.

Section 5—*Approval by Eastern Conference*

Before any strike or stoppage of work takes place over a grievance or interpretation arising out of this Agreement or Supplements hereto that cannot be settled in accordance with the grievance machinery as set out in this Agreement, there must be approval by the International Director of the Eastern Conference of Teamsters or his duly authorized representative, with notice of such approval to be given to the Employer, in writing, prior to such a strike or stoppage of work. The granting of such approval by the Eastern Conference of Teamsters shall not impose any liability on said Conference.

Section 6—*Illegal Strikes*

It is further mutually agreed that the Local Union will, within two (2) weeks of the date of the signing of this Agreement, serve upon the Employer a written notice which notice will list the Union's authorized representatives who will deal with the Employer, make commitments for the Union generally and in particular have the sole authority to act for the Union in calling or instituting strikes or any stoppages of work in a case where a strike or stoppage is authorized under this Agreement, and the Union shall not be liable for any activities unless so authorized.

It is agreed that in all cases of unauthorized strike, slowdown, walkout, or any unauthorized cessation of work in violation of this Agreement, the Union shall not be liable for damages resulting from any unauthorized action of its members. While the Union shall promptly undertake every reasonable means to induce said employees to return to their jobs during such period of unauthorized stoppage of work mentioned above, it is specifically understood and agreed that the Employer shall have the sole and complete right of discipline, including the sole and complete right to discharge any employee participating in any unauthorized strike, slowdown, walkout or any other cessation of work and such employee shall not be entitled to have any recourse to any other provision of this Agreement.

Section 7—*Examination of Records*

The Local Union Business Agent shall have the right to examine time sheets and any other records pertaining to the computation of compensation or fringe benefits of any employee whose pay is in dispute or records pertaining to a specific grievance.

Section 8—*Health, Welfare, and Pension Contributions*

A. Notwithstanding anything herein contained, it is agreed that in the event the Company is delinquent at the end of a period in the payment of its contribution to the Health and Welfare or Pension Fund or Funds created under this Agreement or Supplements hereto, in accordance with the rules and regulations of the Trustees of such Funds, the employees or their representatives, after the proper official of the Local Unions shall have given seventy-two (72) hours notice to the Company of such delinquency in Health and Welfare or Pension payments, shall have the right to take such action as they deem necessary until such delinquent payments are made and it is further agreed that in the event such action is taken, the Company shall be responsible to the employees for losses resulting therefrom.

B. It is mutually agreed that all monies due and owing under the Health and Welfare and Pension provisions of this Agreement or Supplements hereto shall be considered as wages and collectible as such.

UNITED PARCEL SERVICE
EASTERN STATES AREA AGREEMENT
NEW JERSEY SUPPLEMENT

December 23, 1976

GRIEVANCE AND ARBITRATION

The parties agree that the Local Parcel Grievance Procedure referred to in Article 6, Section 2(c)(1) of the Eastern States IBT Area Agreement shall be as follows:

Section (1)

Employees shall have the shop steward present on any grievance.

Section (2)

(a) The A. A. P. G. C. shall be composed of United Parcel representatives and one representative from each of the Local Union Nos. 22, 28, 29, 61, 71, 171, 175, 177, 322, 355, 391, 453, 505, 509, 539, 623, 639, 697, 789, 822, 876 and 992. The expense incurred by the A. A. P. G. C. shall be borne equally by all the Local Unions on a pro rata basis for the Local Unions having cases docketed on the agenda and United Parcel operations which are covered by this Agreement.

(b) In order that the A. A. P. G. C. may operate quickly and efficiently, the parties agree that a person who may or may not be a member of the A. A. P. G. C. shall be mutually selected and designated to serve as Secretary. The Secretary, if not a member of the A. A. P. G. C. shall have no voice in making decisions and shall perform only the duties assigned to him by the A. A. P. G. C. The Secretary shall docket cases, prepare the agenda and mail a copy, prior to the scheduled meeting of the A. A. P. G. C. to each member of the Committee, the Employer, and Local Unions whose case appears on the agenda. The Secretary shall attend the meetings to prepare and keep the minutes and mail copies of the minutes to the members of the Committee and shall also mail copies of the decisions to the A. A. P. G. C. to all United Parcel Service,

Inc. representatives and Local Unions who are parties to this Agreement.

(c) A grievance to be heard by the A. A. P. G. C. must be put in writing and submitted to the Secretary seven (7) days before the meeting of the Joint Area Grievance Committee. The parties further agree that no grievance or grievances shall be discussed except those which have been received by the Secretary of the A. A. P. G. C. before the seven (7) days prior to the date of the meeting of the A. A. P. G. C. It is agreed that there shall be three (3) representatives of the Unions and three (3) representatives of United Parcel Service on each panel that hears a case. The members of the panel are to be selected from the overall A. A. P. G. C. The decision of the majority of the panel hearing the case shall be binding on all parties.

(d) It is understood and agreed that the United Parcel representatives and the Local Union representatives of the A. A. P. G. C. representing the United Parcel Service operation and/or Local Union involved in a proceeding before the panel will be ineligible to act as a member of the panel during the proceeding.

(e) It is agreed that all grievances pertaining to matters described in this Article must be referred to the A. A. P. G. C. It is further agreed that all discharge cases be docketed first on the agenda.

Section (3)

If any grievance or dispute cannot be satisfactorily settled by a majority decision of the panel of the A. A. P. G. C., then the grievance shall be submitted to the Federal Mediation and Conciliation Service by either or both parties within five (5) days. It is agreed that the arbitrator is empowered to hear and decide the deadlocked

case even if only one of the parties submits to arbitration, or, if one of the parties fails to appear at the hearing or to present evidence. The arbitrator shall have the authority to apply the provisions of this Agreement, and to render a decision on any grievance coming before him, but shall not have the authority to amend or modify this Agreement or establish new terms and conditions under this Agreement. The cost of the arbitration shall be shared equally by the parties. The decision of the arbitrator shall be final and binding on the parties and employees involved. In the event that the losing party fails to abide by the arbitrator's decision, or that either party refuses to submit to his jurisdiction, the other party shall have the right to take all legal or economic recourse.

Exhibit E

February 15, 1977

Teamsters Local #177

vs.

United Parcel Service

Case No. 874
Type—Discharge
Employee—William Mitchell
Center—Staten Island, New York

Gentlemen:

On January 8, 1977, Mr. William Mitchell was put on a notice of discharge for stealing time and falsifying Company records. On January 13, 1977, a hearing was held at the Staten Island Center and the company presented their facts about Mr. Mitchell's assumed misconduct. The union's position was that if indeed Mr. Mitchell did what the company said he did, he was only doing what had been past practice and was done with company consent. On Friday nights the company allows our members to go home four hours undertime and pays them for eight hours. They also let Local 177 people lock the building because there are no supervisors with them. If the company managers consent to this type of activity, then it must be assumed that they will tolerate other types of misconduct. This local union feels that Mr. Mitchell, if he committed the acts, should have been warned to stop what he was doing. This union also strongly feels that Mr. Mitchell should not have been fired.

We respectfully request that the claim of the union be upheld. Attached is Mr. Mitchell's own statement of facts.

Attachment

Jan. 19, 1977

Summary of the events leading to the dismissal of William Mitchell, Carwasher, S. I. center.

Dear Mr. Purcell,

Begining in 1969 I became the carwasher at the S. I. center at which time the company policy was to turn the building over to me when I arrived for work at 6 p.m.

For the overwhelming majority of time during the 8 yrs. 1/69 to 1/77 no representitive of management was present at this facility during the hrs. of 6 p.m. to 7 a.m. during the period from 1/69 to 1/77 supervisors have been assigned to the center to observe the operation. These activities included; prolonged T. V. watching, the repair of private autos, trips to various establishments off the company property to secure refreshments, and various other activities unrelated to the employees function at U. P. S. These activities were observed, approved of by and activly joined into by every manager or supervisor that ever stayed at night for a period of at least 3 yrs. The people who have obeserved this situation include Louis Pillarella manager, who at one time left his private automobile in the care of one of the carwashers for the purpose of performing repairs on it. This epesoide was admitted to by Pillarella.

Other witnesses include: N. Mellillo, B. Flynn, B. Main, L. Weeks, J. Sardella, K. Swier all supervisors.

During the protrated periods of time I was left unsupervised management accepted my performance as being entirily satisfactory. During the tenure of Pillarella as manager presure has been placed on all inside employees to deliver parcels. The work of these psedo-deliverymen has then been credited to the regular drivers to achieve a apperance of superiour "on road time". I as carwasher

however, refused to capitulate to these ileagle demands and a policy of harassment was begun, whitch failed. These harassments included, but where not limited to, a company effort to have me terminated because the engine in a 17 yr. old truck failed, obstenibly because of low oil reserves; the remaining fleet was check for this condition and it was found not to exist. The Union argued sucsessfully in my behalf, however, a 3 day suspension was arbitraily placed in effect. The company's position at this time was," to accept the suspension or take it to arbitration," in whitch case a 3 mounth de-facto suspension would have resulted. The 3 day's were acceped under protest.

All other atempts at coersion failing, and apparently honoring a commitment made to the company, a conspiricy was entered into by management to charge the carwasher with a sudden case of "leaving the building". The idea to charge "leaving the building" was instigated by events whitch took place on the night of 7/8/76. After punching out and entering my automobile to go home I was forcibly restrained on company property by 3 men including the manager, Pillarella, and forced to remaine in this confined status for a period of at least 20 min. After producing my time card apoligies were made and I was alowed to leave. The next day however, I was informed that I was being dissmissed for actions proporitly observed by supervisors on previous occasions.

In the hearing that followed management attempted to prove thier positition by offering that I had seriptisisly left the building by offering written statements to that effect.

I vigorisly denied the charge and challenged the company to produce some proof other than thier supervisors unsubstanciated statements. The company's answer was that thier supervisors word was good enough. It seems resonable to assume that when management is accusing

an employee of being a "thief and embezzeler," irrevocable evidence should be the order of the day. To allow the company to remove from thier employ a man with 13 yrs. seniourity just by vitue of thier collective statements would be lending credibilty to a premise that would efectivly distroy our integrity as human beings.

In discribing some of the events which have taken place during my 7 yrs. as carwasher on S. I. I am only trying to put the events which led to my dismissal in thier proper context. I am guilty however of allowing myself to achieve a feeling of false secuity by permiting management, many times, to work outside the barganing agreement. For ex. loading the missed pieces into a truck at managements suggesttion and bringing them to a truck making pickups because of a impending audit. This example corecttly shows managements attitude in regards to rules.

I do offer this statement to be a true and accuate account of the information contained herein.

Respectfully yours,

/s/ William Mitchell

[Notarial Stamp]

Exhibit F.

Feb. 16, 1977

Mr. Frank Fitzsimmonds, President
I. B. T.
25 Louisiana Ave. N. W.
Washington, D. C.

Dear Mr. Fitzsimmonds

My name is William Mitchell an employee of United Parcel Service in Staten Island N. Y. A situation has developed here whitch I hope will merit your attention. I've been discharged and been called a "thief and embezzler" by James Kilkenny a division mgr. for U. P. S. in central N. J. The company offered no proof of these charges other than the statements made by thier supervisors. I've enclosed correspondence between myself and the company to futher explain the situation.

Local #177 to which i've been a membe of for 13 years has done a excellent job in protecting my rights under the contract.

Joe, Purcell and Donald Mason B. A.'s for the local have done a tremendous job in my behalf. However because of the company's unresonable position i've been compelled to hire a atornney to protect my civel rights.

Due to the sever fincial hardships placed upon me by U. P. S. I feel I must turn to the International for financial assistance to fight this miscarridge of justice, which, if left unchallenged, will give U. p. S. the leagel precident there looking for to terminate unwanted senority employee's merely by vitue of thier unsubstanciated charges.

Any consideration vou can give this matter will be greatly appreciated by myself and my family and by stop-

ping this attempt by U. P. S. to get rid of good union men by any possible method you will be reaffirming the rights of every member of our union to protect themselves from the malacious atempts by this company to destroy any employee who they feel has outlived thier usefullness.

I'me hoping this letter finds you and your family in excellent health.

REspectfully yours,

/s/ WILLIAM MITCHELL

Exhibit G

ATLANTIC AREA PARCEL GRIEVANCE COMMITTEE

Established in accordance with the terms and conditions of the Atlantic Area Parcel Agreement, entered into by and between the several Local Unions and United Parcel Service, Inc.

Docket No. 874

IN THE MATTER OF THE DISPUTE BETWEEN

Teamsters Local #177, Irvington, N. J.
(City and State)

and

UNITED PARCEL SERVICE, INC.

SUBMISSION

We, the undersigned, parties to the Atlantic Area Parcel Agreement, hereby agree to submit the following dispute for a decision under the Rules of Procedure prescribed by the Atlantic Area Parcel Grievance Committee, by virtue of its authority, as set forth in Article 7 of the Atlantic Area Parcel Agreement.

> On behalf of car washer William Mitchell, Union alleges violation of Article 45 (Supplement)—unjust discharge—and requests that grievant be reinstated with full back pay.

The undersigned further agree that a majority decision of the Joint Committee in the above dispute will be final, conclusive and binding with no appeal and, further, that neither party will attempt through any overt acts, to void the decision rendered.

The undersigned also agree that failure to comply with the decision of a majority of the committee within ten (10) days of the date of the decision will result in the loss of all contract rights, privileges and benefits due them under Article 7 of the Atlantic Area Parcel Agreement.

Date: 2-16-77
Employer: United Parcel Service, Inc.
Signed by: William Pastor
Title: District Manager
Local Union: 177
Signed by: Joseph Purcell
Title: Business Agent

DECISION

The panel in executive session, motion made, seconded and carried that the claim of the Union be denied and the discharge be upheld.

Frank Feely
Employer Co-Secretary

2-16-77
Date

Al Barlow
Union Co-Secretary

2-16-77
Date

AFFIDAVIT OF WILLIAM MITCHELL SWORN TO JULY 17, 1979 IN OPPOSITION TO DEFENDANT'S SUMMARY JUDGMENT MOTION AND EXHIBITS ANNEXED THERETO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

78 Civ. 1547 (CPS)

WILLIAM MITCHELL,

Plaintiff,

—against—

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177, AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM MITCHELL, being duly sworn, deposes and says:

I am the plaintiff in this action, and am making this affidavit in opposition to the summary judgment motion of the defendants United Parcel Service, Inc. (hereinafter "UPS") and International Brotherhood of Teamsters,

Chauffeus, Warehousemen and Helpers of America (hereinafter "International Brotherhood"). It is my understanding that the defendant Department Store and Wholesale Drivers, Warehousemen and Helpers, Local Union #177 (hereinafter "Local #177") has not moved for summary judgment.

In 1964, I was first employed by the defendant UPS.

On January 13, 1977, I was advised by James Kilkenny, a UPS Division Manager, that I was being discharged for alleged dishonesty, and was provided with a letter to that effect on January 28, 1977 (See Exhibit "C" annexed to the Kilkenny affidavit).

The reason that I was discharged was that I had allegedly been "stealing time," that is, requesting payment for hours which I had allegedly not worked. The dates for which I had allegedly sought to be paid and submitted a time card setting forth certain hours, when in fact I allegedly had not worked those hours, were June 16, 1976, June 18, 1976, June 28, 1976, June 29, 1976, July 1, 1976, July 6, 1976, July 7, 1976, and July 8, 1976.

The basis for the UPS charges against me was that certain other UPS employees who had been directed to spy upon me by UPS, had allegedly seen me leaving work or they had not seen me being present at work during certain hours for which I had submitted time cards indicating that I had been working and should be paid for.

UPS did not explain how I could possibily not have been present on the job when the time cards which I submitted clearly showed that I had clocked in and out on the UPS time clock at the Staten Island facility where I was employed, on certain dates and times.

In order to support their totally unfound charges against me, UPS took the position that I had "found some way to tamper with the time clock." In fact, I have never

tampered with the time clock, do not know how to tamper with the time clock, and there is absolutely no evidence or testimony that I was ever seen tampering with the time clock or even loitering in the area of the time clock. The sole basis for the statements that I must have tampered with the time clock, is that certain UPS employees did not see me working when I should have been, and accordingly the conclusion was reached that therefore my time card must have been falsified and I must have tampered with the time clock in order to have my time card reflect the hours which it did.

From the very first time in July of 1976 when I was advised that UPS was claiming that I had tampered with the time clock and was "stealing time," I vigorously denied all of the charges and requested an opportunity to confront the persons who claimed I had not been present at work for the hours reflected on my time card.

Pursuant to the agreement between the Union of which I am a member, Local #177, and the UPS, I was to be advised of the charges against me before being discharged.

I was advised that Mr. Kilkenny would be present at the Staten Island facility and advise me of the charges against me some time in July of 1976. Due to the fact that either Mr. Kilkenny was unavailable or because the Union representatives were unavailable, the original date for a meeting in July of 1976 was cancelled.

I have read the Kilkenny affidavit, and Mr. Kilkenny attempts to mislead this court into believing that the initial July 1976 meeting to inform me of the charges was cancelled because I was injured on a job prior to that date. This is false.

Mr. Purcell, the Union representative and business agent, testified under oath during his deposition that the reason the initial meeting was adjourned was because

someone couldn't make it (Pages 28-29 Purcell deposition), that someone being someone other than myself.

Thereafter, the meeting was scheduled for July 14, 1976. Unfortunately, on that morning I was injured at work, and was disabled for the next five months. Here again, Mr. Kilkenny attempts to insinuate that my injury was feigned in order to avoid having the meeting where I would be informed of my discharge. This is likewise misleading. It was I who requested to return to work, and it was the UPS doctor who consistently would not permit me to go back to work until December of 1976.

Shortly after I returned to work, I was advised that the meeting with regard to my alleged stealing of time would be held on January 13, 1977. Throughout his affidavit, Mr. Kilkenny refers to this meeting as a "hearing." There was no "hearing" of any nature whatsoever. In fact, UPS refused to provide me or the Union with any charges or even copies of the time cards which were allegedly false prior to this January 13, 1977 meeting.

In his affidavit of June 4, 1979 in support of the summary judgment motion, Mr. Kilkenny states (Paragraph # 7):

> "After hearing and considering the union's arguments on Mr. Mitchell's behalf, I then informed Mr. Mitchell that his dishonest and irresponsible behavior necessitated that we terminate his employment with UPS."

In fact, Mr. Kilkenny had decided prior to the meeting that I was to be discharged, and the meeting was simply an exercise of futility. Any statements by Mr. Kilkenny that he considered the matters which were brought up at the January 13, 1977 meeting before deciding to discharge me, are misleading. During his deposition in this case, Mr. Kilkenny testified as follows (Pages 27-28):

"Q. Who had made the determination that Mr. Mitchell was to be discharged at this hearing?

A. I made the determination.

Q. Had you made the determination prior to the meeting?

A. Well, he was physically discharged at the hearing.

Q. Had you made the determination that he was to be discharged prior to the meeting?

A. Well, I guess I had. After looking at all the evidence I was fairly determined that Mr. Mitchell was going to be discharged. I couldn't think of anything that would have come up at the hearing to change my mind, but we had the hearing.

Q. You say you "had the hearing." You mean you went through the motions?

A. We had the hearing and listened to Mr. Mitchell.

Q. And Mr. Mitchell said he did not do it?

A. Yes, he did.

Q. And at the end of the meeting you told him he was discharged?

A. I told him—I don't know if it was at the very end of the hearing, but I told him that he was going to be discharged."

Thereafter, I was notified in writing that I was discharged.

In preparation for this meeting on January 13, 1977, Mr. Purcell admittedly did next to nothing. According to Purcell's own testimony, he was involved in contract negotiations in Washington, so that he did not have time to investigate the matter (Page 29, Purcell deposition). Although Mr. Purcell and the Union had more than six months to investigate the charges against me between July

of 1976 and January of 1977, they did nothing during this entire period (Page 30, Purcell deposition). They made no demand for a specification of charges before the January, 1977 meeting (Page 33, Purcell deposition), and Purcell obtained no information from the shop steward, Harry Stanley, before the January, 1977 meeting (Page 35, Purcell deposition).

The Union also did nothing to check out the time clock to determine whether it was working properly (Page 36, Purcell deposition), nor did they request to examine the time cards (Page 38, Purcell deposition).

Understandably, since the Union did nothing to prepare for the meeting and UPS had already determined that I was to be discharged before the meeting even took place, I was discharged immediately following the January 13, 1977 meeting.

I was advised that the Union would file a grievance on my behalf and Purcell advised me that he would inform me when the grievance hearing was to take place.

At that same time, I advised Mr. Purcell that two other UPS employees, Donald Endriss and Walter Murray, could be my witnesses at the grievance hearing.

I thereafter heard nothing at all from Mr. Purcell about when the grievance hearing would take place until February 14, 1977, at approximately 12:15 in the afternoon. On that day, I received a telegram advising me that the grievance hearing was to take place in Virginia Beach, Virginia on February 16, 1977, and that if I wish to attend, I must assume all my expenses (a copy of that telegram is annexed hereto as Exhibit "A").

Upon receipt of the telegram, I immediately called the Union Local and asked if the meeting could be adjourned from February 16, 1977 for several reasons:

a. I could not possibly get to Virginia by February 16, 1977 without funds;

b. I could not possibly prepare my case or obtain witnesses on such short notice;

c. I wanted to consult with counsel; and

d. I had applied for welfare so that my family could eat, and had an appointment at the welfare office on that day.

I further advised the Local that if they could not adjourn the hearing, then at the very least, they should supply me with the funds so that I could get to the hearing in Virginia.

Up to the time I had received the telegram advising me that the hearing would be in Virginia, I had always expected that the hearing would be held in the New York area or in Newark, New Jersey, so that I could attend.

I was advised by the Union that there was nothing they could do for me.

Thereafter, I was advised by the Union that my discharge had been upheld in Virginia and "that's the way it goes."

I requested a copy of the minutes so that I could determine what had transpired in Virginia and was advised that I could not have a copy but that I would have to hire a lawyer and subpoena them.

When my lawyers finally obtained a statement of what had occurred in Virginia, it became clear to me why the Union had refused to provide me with a copy of the minutes. A copy of the minutes is annexed hereto as Exhibit "B."

As can be seen from a review of Exhibit "B," my interests were never properly represented by the Union and their defense was absurd, contrary to my position, and non-existent for all practical purposes.

Commencing on Page 46 of the minutes, Mr. Purcell allegedly represented my position.

From the very first time that the charges were brought I persistently advised Mr. Purcell that I had not been guilty of stealing time and that the charges against me were false. Mr. Purcell did not obtain any witnesses or even attempt to or ascertain whether the time clock was operating properly, but rather represented to the panel that in fact I was guilty as charged by the company, but that my alleged misconduct was acceptable because of the company's policy in the past, and that therefore I should not have been fired but warned to stop what I was doing.

As can be seen, the Union's position admitting that I had been guilty of stealing time is totally contradictory to my statement which I had supplied to Mr. Purcell at his request.

What makes the situation even more absurd is that after admitting that I had been guilty of the misconduct alleged by UPS, the Union then read my statement to the panel, advising them that I was not guilty of the charges.

Understandably, after my own Union had admitted that I was guilty of stealing time, but was simply pleading for a lesser penalty, the panel upheld my discharge.

Annexed hereto as Exhibit "C" is a copy of the pre-hearing statement, filed by the Union on my behalf, which admits that UPS is correct and that I was stealing time, but simply pleads for a lighter penalty.

After receiving a statement of this nature from my own Union, the panel necessarily would discharge me.

When one compares the statements submitted by the Union allegedly on my behalf with my own statement that I was not guilty of anything, it can readily be seen that the Union did not represent me at all, but in fact undercut any possible chance I would have had in front of the panel by stating to the panel that I had allegedly been guilty of stealing time.

It should also be noted that the Union did nothing to obtain any witnesses for me or to obtain any statements from witnesses.

I had told Mr. Purcell that Endriss and Murray could be witnesses for me and yet Mr. Purcell to my knowledge did not attempt to obtain a statement from any of these witnesses.

Mr. Purcell admits that he did not even attempt to interview any of the company's witnesses who alleged they had seen me stealing time (Page 83, Purcell deposition), and that he did not attempt or get copies of the statements given by any of the UPS personnel of what I was being charged with (Page 84, Purcell deposition).

Purcell never even asked to see the time cards which I had been alleged to falsify, since he "assumed he would be turned down" (Page 115, Purcell deposition).

Following my discharge, I continuously called Purcell and requested to be told when the grievance would take place and Purcell had promised to inform me as soon as he knew.

Admittedly, Purcell knew that the grievance would be held in Virginia Beach, Virginia by the 10th of February (Page 69, Purcell deposition), but did nothing to inform me until February 14, 1977 at noon.

Had I been given an adequate opportunity, I could have come to Virginia and could have brought my witnesses, specifically, I had contacted both Endriss and Murray and asked them if they would testify at my grievance hearing and they had said yes.

Purcell did not even ask me to obtain statements from the witnesses, but only requested my own statement and I was not told that my statement would be presented to the panel, but thought that it was for Purcell's own purposes.

The extreme importance of my having been at the panel in Virginia is demonstrated by the fact that Kilkenny is compelled to admit that the panel members asked Purcell where I was. The following colloquy occurs during Mr. Kilkenny's deposition (Page 51):

"Q. Did any panel member ask you where Mr. Mitchell was?

A. No, he did not.

Q. Did you hear any panel member ask Mr. Purcell or Mr. Pastor where Mr. Mitchell was?

A. I believe Mr. Purcell was asked whether the grievant was present.

Q. Who asked him that?

A. Which member of the panel I don't know.

Q. But it was one of the panel members?

A. Yes.

Q. What did Mr. Purcell say?

A. I don't remember his exact words but he told them he wasn't there.

Q. Did Mr. Purcell tell the panel why he was not there?

A. I don't recall.

Q. Did the panel ask Mr. Purcell if he had any witnesses on behalf of Mr. Mitchell?

A. Not that I recall.

Q. Do you know if Mr. Purcell introduced any witnesses on behalf of Mr. Mitchell?

A. Not that I recall.

Q. Was it permissible to have witnesses at this hearing?

A. Yes.

Q. And UPS had brought down several witnesses, had they not?

A. The company had brought several people that would have been available to—

Q. To testify?
A. To testify, if they were needed."

The foregoing testimony also shows that UPS had witnesses at the hearing, while I was not present and with the Union admitting that I had allegedly stolen time, I could not help but lose the hearing and be discharged.

Purcell, during his deposition, admits that the Union obtains dues of approximately $500,000.00 a year (Page 6, Purcell deposition), and promised to provide my attorneys with a statement of the Union's assets in February of 1977, but has not done so (Page 8, Purcell deposition). Purcell also admits that the Union paid for his transportation and room, and in addition, provided him with $50.00 per day for food and incidentals (Page 13-16, Purcell deposition).

Your deponent suggests that the Union had a duty to properly and fairly represent your deponent by making it possible for him to attend the grievance hearing where I was to be discharged from a job which I had held for over thirteen years.

Following my discharge from the Union, I was desparate and wrote the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "International Brotherhood"), requesting or begging for their aid and assistance, hoping to attain some assistance from the International Brotherhood. I naturally advised the International Brotherhood that Joseph Purcell and Donald Mason, the Local's business agents, had done a tremendous job on my behalf. In fact, the job performed by Mr. Purcell and Mr. Mason was abysmal and they provided me with no representation or defense. Their purported defense was directly contrary to what I had informed them was the fact, that I had not stolen any time and was completely contrary to my sworn statement submitted to the panel, so that in essence I was pleading not

guilty and guilty at the same time and was assured of being discharged from my position.

A fair hearing would require that I be given reasonable notice to attend that hearing, at the very least the Union request an adjournment, which Mr. Purcell admits he did not even know if he could do (Page 87, Purcell deposition) and did not even bother to seek an adjournment, but simply submitted a perfunctory statement to the panel on my behalf which directly contradicts the facts as I had advised the Union.

The importance of my not being able to attend the hearing is underscored by the fact that the panel requested to know where I was, since obviously if I did not bother to attend, I could not have a very good defense.

After I was discharged, the Union did nothing at all to attempt to aid or even attempt to obtain another position for me. When I wrote to the International Brotherhood, I was simply brushed off.

The statements made in the Kilkenny affidavit that I refused to exhaust my Union remedies and therefore I should not be permitted to bring this action, are misleading. To my knowledge, and so far as I am aware, although having been a member of the Union for thirteen years, there are no intra-union remedies which were available to me. Exhibit "H" annexed to the Kilkenny affidavit which purports to provide an intra-union remedy, is misleading. It was my understanding that that only deals with penalties against Union officials for various charges set forth on Page 123 *et seq.* of Exhibit "H." Those intra-union remedies do not and cannot apply to an unfair representation claim, since what possible remedy can an internal Union trial possibly provide to get me restored to my position.

It was my understanding that the intra-union remedies apply to situations where an employee had a grievance against a Union member or official with regard to conduct

which the Union could cure and that it would be futile to seek an intra-union remedy when the Union could not possibly aid me once I had been discharged, because they failed to properly represent me.

In short, after paying dues to the Union for thirteen years and being prevented from obtaining counsel or seeking a legal remedy against UPS because of the agreement between the Union and UPS, I was denied an opportunity for a hearing or to be heard when I was to be discharged from my job.

The Union's efforts on my behalf were less than perfunctory, but were completely contrary to the facts as related to them, and sabotaged whatever chance I might have had to have the panel restore me to my position.

Coupled with the fact that I did not have adequate notice of the hearing, did not have an opportunity to seek witnesses, the Union's failure to obtain any witnesses for me or provide me with funds to get to Virginia, make it clear that my rights were not protected by the Union and I have a right to maintain this action against the Union and UPS for unfair representation and an improper discharge from employment.

Whether I win my case will depend on proof at the trial, but at the very least I deserve an opportunity to finally be heard and not be discharged because UPS claims that I must have devised a way to tamper with the time clock, although submitting no proof of that and which allegation I vigorously deny.

What the defendants are seeking here is to simply prevent me from ever having a fair hearing or day in court, and this they should not be permitted to do.

WHEREFORE, it is respectfully requested that the defendants' motions for summary judgment be denied in all respects.

/s/ WILLIAM MITCHELL
William Mitchell

Sworn to before me this 17th day of July, 1979.

DAVID JAROSLAWICZ
Notary Public
David Jaroslawicz
Notary Public, State of New York
No. 41-7076140
Qualification New York County
Term Expires March 30, 1980

Exhibit "A"

2013735209 TDMT Irvington NJ 41 02-14 1224P EST
PBA 015 1239P

PMS WILLIAM MITCHELL, RDM REPORT DELIVERY BY MAILGRAM, DLR
431 WOOLEY AVE

STATEN ISLAND NY 10314 (*Get Time & Signature*)

PLEASE BE ADVISED THAT YOUR GRIEVANCE AGAINST UNITED PARCEL SERVICE CONCERNING YOUR DISCHARGE WILL BE HEARD BY THE PANEL ON WEDNESDAY FEBRUARY 16 1977 IN VIRGINIA BEACH VIRGINIA IF YOU WISH TO ATTEND YOU MUST ASSUME ALL YOUR EXPENSES PLEASE ADVISE RALPH PORFORA, LOCAL 177 (1001 SPRINGFIELD AVE IRVINGTON NJ 07111)

Exhibit "B"

(Material relating to prior case deleted.)

Chairman Barlow called for *Case 874*:

Local 177 v. UPS, Staten Island, N. Y.

On behalf of car washer William Mitchell, Union alleges violation of Article 45 (Supplement)—unjust discharge—and requests that grievant be reinstated will full back pay.

Union Panel: A. Barlow
R. Hogan
J. Sullivan

Company Panel: F. Feely
J. Foley
D. Murray

Mr. William Pastor presented the case for the Company. He presented the following statement of fact to the Committee:

William Mitchell has been employed by United Parcel Service since May 18, 1964.

On Thursday, January 13, 1977, he was discharged from United Parcel Service for his dishonest acts of stealing time and falsifying his time cards.

During his employment, William Mitchell has been a package driver, preloader, and at the time of his discharge, a car washer at our Staten Island, New York operating center. His scheduled start time is 6:30 p.m., he get a half hour for lunch and his scheduled 8 hours are up at 3 a.m.

The events leading up to his discharge are significant and bear repeating in that they show a clear pattern of his total disregard for his responsibilities as an employee. Not once, but on seven separate occasions, Bill Mitchell was observed by company supervisors leaving his job several hours prior to its completion. On each instance he turned in a time card showing in fact that he had worked 8 hours or longer.

Our first indication that he was not completing his assigned work day occurred on Wednesday, June 16, 1976. On that date, Ed Schmidl, shop supervisor, arrived at the Staten Island Center at 1:55 a.m. to work with the mechanic, Steve Giglio. When he arrived, there were four employees in the Center. Bill Mitchell was not there. Ed remained in the Center until 11:00 a.m. in the morning. Ed did not see Bill Mitchell at any time while in the center. Yet Bill Mitchell's time card for that day showed he started work at 6:30 p.m. and finished at 3:43 a.m. Mitchell was paid for 8.72 hours of work. Ed Schmidl reported what he had observed to Center Manager Lou Pillarella and told Lou he was coming back to work with the mechanic on 6/18/76 and would check on William Mitchell's presence on the job.

Mr. Pastor read the write up from Ed Schmidl and presented it to the panel. He also submitted Mr. Mitchell's time card to the panel. Mr. Pastor continued with his presentation:

On Friday, June 18, 1976, Ed Schmidl arrived at the Staten Island Center at 2:15 a.m. Upon entering the building, Ed checked it completely. William Mitchell was not there. Ed Schmidl observed the time clock until 4:30 a.m. and saw seven men use it. At no time did he see William Mitchell in the center or use the time clock. William Mitchell's time card showed a punch out time of 4:04 a.m. Mitchell was paid for 9.06 hours of work.

Mr. Pastor submitted Mr. Mitchell's time card to the panel, as well as the time cards of the other employees who reported for work. He also submitted a write up from Ed Schmidl to the Division Manager. Mr. Pastor continued with his presentation:

On Monday, June 28th at 11:00 p.m., Ken Kett, Loss Prevention Supervisor, and Kenilworth supervisor Nick Melillo arrived at the Staten Island Center. At 12:45 a.m. on June 29th, they observed Bill Mitchell leave the building. They followed Bill to his home on Woolley Avenue, which he entered. They then returned to the Staten Island Center and observed the building until 4:30 a.m. Bill Mitchell never returned to the building. He turned in a time card with a punch out time of 4:15 a.m. and was paid for 9.24 hours.

Mr. Pastor submitted the write up from the Loss Prevention Supervisor and Mr. Mitchell's time card to the panel. He continued with his presentation:

On Tuesday, June 29, Bill's time card showed a punch in date of June 29 at 6:16. His time card also showed a punch out date of June 29, 4:27 a.m. Brian Flynn saw Bill Mitchell arrive at the Staten Island Center at 6:45 p.m. on June 29 but Bill's time card as indicated above showed a punch in time of 6:16 p.m.

Mr. Pastor submitted the write up from the supervisor and Mr. Mitchell's time card, indicating his punch in time as 6:16 p.m. He continued with his presentation:

On July 1st at 10:00 p.m., Nick Melillo and Ray Zienowicz arrived at the Staten Island Center. Bill Mitchell's car was not at the center. At 10:35 p.m., Nick Melillo entered the building and completely inspected it. Bill Mitchell was not in the building. At 11:30 p.m. they both observed Bill Mitchell return to the building. At 12:45 a.m. on July 2,

1976, they both observed Bill Mitchell leave the Staten Island building. They watched the building until 4:20 a.m. and never saw Bill Mitchell return. At 4:30 a.m. they drove past Bill Mitchell's house and his car was parked there. Bill Mitchell turned in a time card with a punch out time of 4:15 a.m. and was paid for 9.25 hours.

Mr. Pastor submitted the write ups from the supervisors and Mr. Mitchell's time card. He continued with his presentation:

On Tuesday, July 6th between 9:00 and 9:05 p.m., supervisor Brian Flynn and Loss Prevention supervisor Ray Zienowicz arrived at the Staten Island Center. Bill Mitchell's car was not on the property. At 9:30 p.m., they observed Bill Mitchell's car parked in front of his home.

Mr. Pastor stated that Mr. Mitchell lived within five or ten minutes of the Staten Island building. He continued with his presentation:

They both returned to the Staten Island Center and saw Bill Mitchell return to the building at 10:50 p.m. At 1:33 a.m., July 7th, they observed Bill Mitchell leave the building in his car. At 1:50 a.m., Brian Flynn went past Mitchell's house and saw his car there. He then returned to the center and Ray Zienowicz and himself watched the building until 3:30 a.m. Between 3:30 and 3:35 a.m., Brian Flynn entered the building and Steve Giglio, the mechanic, was the only one inside. Flynn observed the time clock until 5:00 a.m. The only people to use the clock were the four night men. Bill Mitchell turned in a time card with a punch out time of 4:09 a.m. Mitchell was paid for 9:09 hours.

Mr. Pastor submitted the write ups from the supervisors and Mr. Mitchell's time card. He continued with his presentation:

Once again, on Wednesday, July 7th, Brian Flynn and Ray Zienowicz were at the Staten Island Center at 9:00 p.m. At 12:24 a.m. on July 8, 1976, they both observed Bill leave with his car. They watched the building until 3:30 a.m. At that time, Ray Zienowicz drove to Bill Mitchell's home and saw his car parked in front of his home at 3:50 a.m. At 3:30 a.m. Brian Flynn entered the Staten Island building and observed the time clock until 5:00 a.m. The only people to use the clock were three night men. The fourth night man was late and Brian signed him in at 4:20 a.m. Bill Mitchell turned in a time card with a punch out time of 4:24 a.m. and was paid for 9.28 hours.

Mr. Pastor submitted the write ups from the supervisors, Mr. Mitchell's time card and the time card of the individual who was signed in by Brian Flynn. Mr. Pastor continued with his presentation:

On Thursday, July 8th, at 5:57 p.m., John Burnetsky, the District Auditor, who was working in the center for the day, observed Bill Mitchell punch a time card to start work. At 9:00 p.m. Ken Kett, Lou Pillarella and Ray Zienowicz arrived at the Staten Island Center. Between 9:55 and 10:00 p.m. they observed Bill Mitchell leave the building in his car. They drove to Mitchell's house where he arrived at 10:20 p.m. They then returned to the Staten Island Center. At 11:30 p.m. Mitchell returned to the Center. At 12:25 a.m. on July 9th, Bill Mitchell left the building and started to drive away. At that time, he left the building and started to drive away. At that time, he was confronted by Lou Pillarella and Ken Kett. When asked where he was going, Bill Mitchell replied, to lunch. He was then asked where he had been from 9:55 to 11:30. He replied he had gone home for an emergency. Center Manager Lou Pillarella then asked to see his time card.

Bill handed him a card with just a punch out time of 12:35 on it. He asked Bill why he had not punched in, he said he forgot. Lou told Bill that was strange inasmuch as John Burnetsky had observed him punch in at 5:57 p.m. Lou also told Bill that he knew what Bill had been doing and what had been going on. To this Bill answered that he was going home sick. Lou informed him that he was going to be put on a notice of discharge for dishonesty. He then started his car and left.

Mr. Pastor submitted the write ups from Lou Pillarella and John Burnetsky and Mr. Mitchell's time card. He continued with his presentation:

At this point, it must be pointed out and already is quite obvious that on seven known occasions, Bill Mitchell left work early and was paid for work he did not perform. He falsified his time cards in order to conceal his activities and to receive unearned pay.

It bears further mentioning that Bill Mitchell's actions were not those of a responsible employee.

At the local hearing held for Bill Mitchell, all of the facts surrounding the incidents were reviewed with him. When asked specific questions as to his activities on the dates in question, Bill commented that none of the facts were true. He further commented that we were out to get him because he was a long seniority employee.

As a result of Bill Mitchell's dishonest acts of stealing time and falsifying his time cards, and because he could not or would not explain his actions, Bill Mitchell was discharged from our employ. (Exhibit I) Exhibit I, a copy of the discharge letter sent to William Mitchell on January 28, 1977, reads as follows:

> "A meeting was held in the Staten Island Center on January 13, 1977. Present were you, Local 177 of-

ficials Joe Purcell and Don Mason, shop steward Harry Stanley, Ray Cooper, Lou Pillarella, Nick Melillo, Brian Flynn and myself.

The purpose of the meeting was quite specific. We reviewed with you the fact that on numerous instances, you were observed leaving the job prior to the completion of your work day. In an effort to conceal this, you falsified your time cards. Your acts were ones of dishonesty and constitute a complete dereliction of your responsibilities as an employee.

When confronted with these facts, you denied them completely and your only explanation was that the charges against you were lies and we were out of get you. You made these comments in spite of the fact that several supervisors observed you on different occasions leaving the job.

We mentioned that we could not tolerate dishonesty from any of our employees.

As a company, we provide you with substantial wage and fringe benefits. For these benefits, we expect that all of our employees be honest with us and provide us with a fair days work.

We made it quite clear to you that you have left us no choice in this matter. Your dishonest acts cannot be tolerated by United Parcel Service. Based on all these facts presented at this meeting, we have no choice but to discharge you from our employ.

/s/ JIM KILKENNY
Division Manager"

As a company we must place our trust in all of our employees.

They are entrusted with large sums of money, and pick up, sort and deliver parcels with high value. Due to the nature of our business, many of our employees spend most of their work day without direct supervision.

When any employee violates this trust by committing dishonest acts, we must deal quickly and severely with that person.

Such was the case with Bill Mitchell.

Bill Mitchell's actions were not those of a responsible employee and constitute a clear dereliction of his duties as an employee.

We must again repeat that not once but on seven known occasions he was observed stealing time. He tried to conceal his acts by keeping two sets of books, so to speak. It is evidence Bill Mitchell found some way to tamper with the time clock in order to falsify his time cards and collect unearned pay.

If we were to condone this type of behavior from Bill Mitchell or any other employee, the fact remains quite clear that our ability to remain in business would be severely challenged. It is further obvious that the jobs of our other employees would be placed in jeopardy.

We had no choice in this matter but to discharge Bill Mitchell.

He has no one to blame but himself in this case.

Based on all of the facts presented, we respectfully submit that the claim of the grievant be denied and that his discharge be upheld.

Mr. Joseph Purcell presented the case for the Union. He presented the following statement of fact to the Committee:

On January 8, 1977, Mr. William Mitchell was put on a notice of discharge for stealing time and falsifying company records. On January 13, 1977, a hearing was held at the Staten Island Center and the company presented their facts about Mr. Mitchell's assumed misconduct. The union's position was that if indeed Mr. Mitchell did what the company said he did, he was only doing what had been past practice and was done with company consent. On Friday nights the company allows our members to go home four hours undertime and pays them for eight hours. They also let Local 177 lock the building because there are no supervisors with them. If the company managers consent to this type of activity, then it must be assumed that they will tolerate other types of misconduct. This local union feels that Mr. Mitchell, if he committed the acts, should have been warned to stop what he was doing. This union also strongly feels that Mr. Mitchell should not have been fired.

We respectfully request that the claim of the union be upheld. Attached is Mr. Mitchell's own statement of facts.

Mr. Purcell presented William Mitchell's statement:

Beginning in 1969 I became the carwasher at the S. I. center at which time the company policy was to turn the building over to me when I arrived for work at 6 p.m.

For the overwhelming majority of time during the 8 years, 1/69 to 1/77, no representative of management was present at this facility during the hours of 6 p.m. to 7 a.m. during the period from 1/69 to 1/77 supervisors have been assigned to the center to observe the operation. These activities included: prolonged T. V. watching, the repair of private autos, trips to various establishments off the company property to secure refreshments, and various

other activities unrelated to the employees' function at UPS. These activities were observed, approved of by and actively joined into by every manager or supervisor that ever stayed at night for a period of at least 8 years. The people who have observed this situation include Louis Pillarella manager, who at one time left his private automobile in the care of one of the carwashers for the purpose of performing repairs on it. This episode was admitted to by Pillarella.

Other witnesses include: N. Mellillo, B. Flynn, B. Main, L. Weeks, J. Sardella, K. Swier, all supervisors.

During the protracted periods of time I was left unsupervised management accepted my performance as being entirely satisfactory. During the tenure of Pillarella as manager pressure has been placed on all inside employees to deliver parcels. The work of these pseudo-deliverymen has then been credited to the regular drivers to achieve an appearance of superior "on road time." I as carwasher however, refused to capitulate to these illegal demands and a policy of harrassment was begun, which failed. These harassments included, but where not limited to, a company effort to have me terminate because the engine in a 17 year old truck failed, obstensibly because of low oil reserves. The remaining fleet was checked for this condition and it was found not to exist. The Union argued successfully in my behalf, however, a 3 day suspension was arbitrarily placed in effect. The company's position at this time was, "to accept the suspension or take it to arbitration," in which case a 3 month de-facto suspension would have resulted. The 3 days were accepted under protest.

All other attempts at coercion failing, and apparently honoring a commitment made to the company, a conspiracy was entered into by management to charge the

carwasher with a sudden case of "leaving the building." The idea to charge "leaving the building" was instigated by events which took place on the night of 7/8/76. After punching out and entering my automobile to go home, I was forcibly restrained on company property by 3 men including the manager, Pillarella, and forced to remain in this confined status for a period of at least 20 minutes. After producing my time card apologies were made and I was allowed to leave. The next day, however, I was informed that I was being dismissed for actions purportedly observed by supervisors on previous occasions.

In the hearing that followed management attempted to prove their position that I had surreptitiously left the building by offering written statements to that effect.

I vigorously denied the charge and challenged the company to produce some proof other than their supervisors' unsubstantiated statements. The company's answer was that their supervisors word was good enough. It seems reasonable to assume that when management is accusing an employee of being a "thief and embezzler," irrevocable evidence should be the order of the day. To allow the company to remove from their employ a man with 13 years seniority just by virtue of their collective statements would be lending credibility to a premise that would effectively destroy our integrity as human beings.

In describing some of the events which have taken place during my 7 years as carwasher on S. I. I am only trying to put the events which led to my dismissal in their proper context. I am guilty, however, of allowing myself to achieve a feeling of false security by permitting management, many times, to work outside the bargaining agreement. For example, loading the missed pieces into a truck at management's suggestion and bringing them to a truck making pickups because of an impending audit.

This example correctly shows management's attitude in regards to rules.

I do offer this statement to be a true and accurate account of the information contained herein.

/s/ WILLIAM MITCHELL"

DECISION:

The panel in executive session, motion made, seconded and carried that the claim of the Union be denied and the discharge be upheld.

(Material relating to subsequent case deleted.)

Exhibit C.

ATLANTIC AREA PARCEL GRIEVANCE COMMITTEE

Established in accordance with the terms and conditions of the Atlantic Area Parcel Agreement, entered into by and between the several Local Unions and United Parcel Service, Inc.

Docket No. 874

IN THE MATTER OF THE DISPUTE BETWEEN

Teamsters Local #177, Irvington, N. J.
(City and State)

and

UNITED PARCEL SERVICE, INC.

SUBMISSION

We, the undersigned, parties to the Atlantic Area Parcel Agreement, hereby agree to submit the following dispute for a decision under the Rules of Procedure prescribed by the Atlantic Area Parcel Grievance Committee, by virtue of its authority, as set forth in Article 7 of the Atlantic Area Parcel Agreement.

> On behalf of car washer William Mitchell, Union alleges violation of Article 45 (Supplement)—unjust discharge—and requests that grievant be reinstated with full back pay.

The undersigned further agree that a majority decision of the Joint Committee in the above dispute will be final, conclusive and binding with no appeal and, further, that neither party will attempt through any overt acts, to void the decision rendered.

The undersigned also agree that failure to comply with the decision of a majority of the committee within ten (10) days of the date of the decision will result in the loss of all contract rights, privileges and benefits due them under Article 7 of the Atlantic Area Parcel Agreement.

Date: 2-16-77

Employer: United Parcel Service, Inc.
Signed by: William Pastor
Title: District Manager
Local Union: 177
Signed by: Joseph Purcell
Title: Business Agent

DECISION

The panel in executive session, motion made, seconded and carried that the claim of the Union be denied and the discharge be upheld.

Frank Feely
Employer Co-Secretary
2-16-77
Date

Al Barlow
Union Co-Secretary
2-16-77
Date

PLAINTIFF'S 9(g) STATEMENT IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DATED JULY 17, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 Civ. 1547 (CPS)

WILLIAM MITCHELL,

Plaintiff,

—against—

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177, AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

PLAINTIFF'S 9(g) STATEMENT

Plaintiff is submitting this statement in response to the 9(g) statement filed by the defendant United Parcel Service, Inc. ("UPS") and claims that there are issues of material facts with respect to the following:

1. There was no *hearing* held on January 13, 1977, but only a meeting at which UPS had already determined to discharge the plaintiff.

2. At the January 13, 1977 meeting, plaintiff was not provided with any specifications or given any documents indicating the charges against him.

3. Plaintiff believed that any grievance hearing would be held in the New York area and was not advised that the grievance hearing would be held in Virginia until February 14, 1977.

4. The Union admitted that there was no established procedure as to where the hearing would be held since this was the first hearing in which Local 177 participated.

5. Plaintiff was advised that the Union would not pay for any witnesses to attend the hearing in Virginia.

6. There was no customary rotation of the Panel since this was the first hearing in which Local 177 was involved and the plaintiff does not know how the site was selected.

7. Plaintiff was unable to be present at the hearing because of the Union's arbitrary conduct. The Union did not represent the plaintiff's position, but presented a position diametrically opposed to that of the plaintiff, admitting that the plaintiff had committed acts he was accused of when the plaintiff had continuously protested his innocence.

8. At the grievance hearing the Panel wanted to know where the plaintiff was.

9. There were no intra-union remedies available to the plaintiff which could afford him relief and if there were, they were not known to the plaintiff.

Dated: New York, New York
July 17, 1979

Ira Leitel and David Jaroslawicz
/s/ By DAVID JAROSLAWICZ
David Jaroslawicz
Attorneys for Plaintiff
Two Lafayette Street
New York, New York 10007
(212) 227-2780

SUPPLEMENTAL AFFIDAVIT OF JAMES KILKENNY SWORN TO AUGUST 30, 1979 IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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79 Civ. 1547 (CPS)

WILLIAM MITCHELL,

Plaintiff,

—against—

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177, AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

KILKENNY SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES KILKENNY, being duly sworn, deposes and says:

1. I am employed by United Parcel Service, Inc. ("UPS" or the "Company") as Division Manager. I make this supplemental affidavit in further support of defendant

UPS's motion for dismissal of the complaint and/or for summary judgment.

2. Article XIX of the Teamster Constitution (Ex. H to Kilkenny Affidavit) sets forth the intra-union appellate procedures that Mr. Mitchell was required to exhaust prior to commencing this lawsuit. The procedures provide for a grievant, like Mr. Mitchell, to protest the Local Union's handling of his case by filing a complaint with the Local Union Executive Board and, if unsuccessful, by filing an appeal to the Union Joint Council and its Executive Board. Further appeals may be taken to the General Executive Board of the International Union and, ultimately, to the International Convention. Mr. Mitchell made no use of these mandatory intra-union appellate procedures.

3. Had Mr. Mitchell appealed to the higher levels of his union, as Article XIX of the Teamster Constitution requires, it could have led to a rehearing before the Joint Panel. Because there could have been a rehearing if Mr. Mitchell had followed the procedures of his union and the rehearing could have provided Mr. Mitchell with the relief he was seeking, Mr. Mitchell should be barred from maintaining this lawsuit. By ignoring the mandatory intra-union procedures, Mr. Mitchell has needlessly wasted the time and resources of his union, UPS, and this Court.

WHEREFORE, it is respectfully requested that defendant's motion be granted in all respects.

/s/ JAMES KILKENNY
James Kilkenny

Sworn to before me this 30 day of August, 1979.

JOSEPH V. MCWADE
Notary Public
Notary Public of New Jersey
My Commission Expires Sept. 29, 1980

SELECTED PAGES FROM THE DEPOSITION OF JAMES KILKENNY

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[51]

A. No, I know of none.

Q. Did any panel member ask you where Mr. Mitchell was?

A. No, he did not.

Q. Did you hear any panel member ask Mr. Purcell or Mr. Pastor where Mr. Mitchell was?

A. I believe Mr. Purcell was asked whether the grievant was present.

Q. Who asked him that?

A. Which member of the panel I don't know.

Q. But it was one of the panel members?

A. Yes.

Q. What did Mr. Purcell say?

A. I don't remember his exact words but he told them he wasn't there.

Q. Did Mr. Purcell tell the panel why he was not there?

A. I don't recall.

Q. Did the panel ask Mr. Purcell if he had any witnesses on behalf of Mr. Mitchell?

A. Not that I recall.

Q. Do you know if Mr. Purcell introduced any witnesses on behalf of Mr. Mitchell?

A. Not that I recall.

SELECTED PAGES FROM THE DEPOSITION OF JOSEPH PURCELL

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[6]

in 1976?

A. Approximately 4,000 people.

Q. What would be the membership, approximately, in 1977 of the Local?

A. About the same.

Q. What are the sources of Local #177's income?

A. What do you mean by that?

Q. What do they derive from, what sources?

A. You mean the union dues, that's all.

Q. Only union dues?

A. Yes.

Q. Do they receive union dues directly from the members, or do they receive it as a checkoff system from the employer?

A. Checkoff.

Q. What is checked off for members of the union, what amounts?

A. In 1976, I believe it was $12.

Q. Twelve dollars?

A. Per month.

Q. Per employee?

A. Yes.

Q. Regardless of the position of the employee?

A. Yes.

[8]

of the Local?

A. Yes.

Q. Who is the present secretary of the union?

A. Perruci, P-e-r-r-u-c-i.

Q. Would Mr. Perruci have copies of the records of the Local of '76 and '77?

A. Yes, he would.

Q. Would you be able to refer to Mr. Perruci now in obtaining that information for us?

A. I will meet with him this afternoon.

Q. Thank you very much.

The $12 per month that you noted was remitted per member to the Local, was that all subtracted from the employee's salary, or was any portion of it paid by the employer?

A. Deducted from his salary.

Q. So that the entire $12, in effect, was paid by the employee?

A. Right.

Q. Do you know who the plaintiff is, Mr. Purcell?

A. William Mitchell.

Q. Yes.

A. Yes.

Q. Do you know whether Mr. Mitchell became a

[13]

(A one-minute break was taken.)

Q. In 1977, in February, you attended a meeting of the Atlantic Area Grievance Committee held in Virginia Beach, Virginia.

A. Right.

Q. Isn't that true?

A. Yes, sir.

Q. How did you go to Virginia, how did you travel?

A. Flew by plane.

Q. By plane?

A. Yes, sir.

Q. Did you go alone to that meeting, or did you travel in the company of anybody else?

A. I went alone.

Q. Who paid for the airplane tickets?

A. 177.

Q. So that was something that the Local had paid over and above your salary and your $50 a week expense account; isn't that true?

A. Local #177 pays all travel and all my room expenses.

Q. So that while you were in Virginia Beach, did you stay in a hotel?

A. Yes.

Q. This is referring again to February 15th and

[14]

16th of '77.

What hotel did you stay in in Virginia Beach?

A. I don't really know.

Q. Did the union, in any event, pay for that hotel room?

A. Local #177 paid for that room.

Q. How did you pay for that, sir?

Did you pay that by giving cash and asking for reimbursement?

A. No.

Q. How did you effect payment?

A. Direct bill back to the Local.

Q. Back to the Local?

A. Right

Q. There was no charge cards used?

A. We didn't have charge cards at that time.

Q. When did you first get charge cards?

A. I got my charge card about six weeks ago.

Q. How about the airline flight, how was payment effected for that?

A. By check.

Q. The Local paid directly?

A. To the airlines.

Q. What about your food while you were there, you

[15]

were required to eat out, obviously?

A. Yes.

Q. Who paid for that?

A. I received a $50-a-day expense for food and taxi fare and what other expenses I needed.

Q. While you were traveling?

A. Yes.

Q. So in addition to the $50-a-week figure in your salary and the union would pay for your airplane transportation?

A. Yes.

Q. And your hotel room?

A. Yes.

Q. And in addition, the union would give you a $50-a-day figure to cover food and taxis?

A. Yes.

Mr. Parsonnet: I'm going to interpose and object at this point.

I have been listening to the questions and I don't understand the relevance to the claims in the Mitchell complaint.

So I am objecting to the question about expenses and payment, therefore, as not being relevant to anything in the complaint.

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Q. The $50 figure that you indicated you received per day, was that similar to the other $50 per week figure, that is, that you received, that regardless of the actual expenses incurred?

A. Yes.

Q. So that if you actually spent less on food and taxis, you kept the difference, and similarly, if you paid more it came out of your pocket?

A. That's right.

Q. While you were in Virginia Beach, Virginia in February of '77, how many nights did you spend there?

A. I think I spent two nights there.

Q. Could you give us the—

A. I think I flew in on a Monday.

Q. What was the date of that?

A. Might have been the 14th.

Mr. Leitel: Let me get a calendar for you.

Q. This column on the calendar would be '77.

A. I think I flew in on the 14th, which is a Monday, and I flew back on the 16th.

So I spent Monday and Tuesday night there.

Q. Monday, the night of the 14th?

A. Right, and Tuesday night, the night of the 15th.

Q. Now, you flew in on Monday the 14th.

[28]

you will respond in general.

The Witness: Fine.

Q. You testified that on the July 12th date of this hearing for one reason or another, your request or the company's request, it was adjourned.

A. Somebody couldn't make it, right.

Q. And you don't recall the reason why it was adjourned?

A. No, I don't.

Q. Did you speak to Mr. Mitchell, if you recall, and tell him that there was an adjournment?

A. No, I didn't. I told the shop steward, Harry Daniel.

Q. Did you tell him to inform Mr. Mitchell that there was an adjournment?

A. Yes.

Q. Was it adjourned to a specific date?

A. I believe it was adjourned to that Thursday or Friday, one of those two days.

Q. Of that—

A. Of that same week.

Q. The Thursday or Friday of that week would be July 15th or July 16th?

A. Right.

Q. Was it held on that date?

[29]

A. No, it wasn't.

Q. Did you take any steps between July 12th and the next scheduled date, the 15th or 16th, to investigate the allegations against Mr. Mitchell?

A. No, Mr. Mitchell went out on compensation on the 13th or 14th, I believe.

Q. During the period of time that Mr. Mitchell was out on compensation—

A. Yes.

Q. — did you, yourself, take any steps to investigate the allegations made against Mr. Mitchell?

A. No, I didn't. Because at that time I was involved in contract negotiations in Washington, D.C.

Q. Did you assign or delegate the task of investigating the allegations against Mr. Mitchell to anyone else in your local?

A. No.

Q. When did you next hear about the Notice of Hearing against Mr. Mitchell?

A. It was in January 9, '77. We had heard nothing from Mitchell for the entire time that he was out on compensation.

Q. Do you know that Mr. Mitchell returned from compensation to work at one time; isn't that true?

[30]

A. In January.

Q. January of '77, you believe?

A. That's what I heard, when he came back to work that is when the company called him.

Q. Who called you from the company?

A. I believe it was either Jim Kilkenny or Elmer Kenworth, they were both division managers.

Q. When did they call you, sir?

A. In January.

Q. Could you be more specific to a date?

A. I guess the week that he came back to work.

Q. That was January of '77?

A. Right.

Q. What did they tell you?

A. They said Mitchell was back to work and they would like to set up a date of the hearing of the charges that they had against him, pending from July, '76.

Q. What was your response?

A. I said, yes.

Q. Was a date set at that time?

A. Yes.

Q. Was that the date, at that time, set for January 13th?

A. Yes.

[33]

A. No. If I can explain.

United Parcel puts a man on Notice. They just give you a generality, stealing time.

They do not tell you specifics until you get into the hearing.

Q. Did you make any attempts before the January 13th of '77 hearing to determine the specifics of the charges?

A. I asked United Parcel Service, and they told me that at the hearing I would hear all the specifics.

Q. Who did you ask for the specifics, and when?

A. Jim Kilkenny, and I asked him right after I got the phone call that they wanted to send to me that Mitchell was back to work.

Q. After the January, '77 phone call?

A. Right.

Q. And you asked this ordinarily of Mr. Kilkenny?

A. On the phone.

Q. What was Mr. Kilkenny's response?

A. I believe his response was that when I got to the hearing I would find out all pertinent facts.

Q. So, did you make any written demands on Mr. Kilkenny for the specifications of the charges?

A. No, I didn't. I never do.

[35]

A. No.

Q. —regarding that matter?

A. No.

Q. Did you receive any calls from Mr. Stanley before the actual hearing informing you of the results, if any, of his investigation?

A. No, I didn't.

Q. You came to the premises of the Staten Island facility—

A. Yes.

Q. —on January 16th?

A. 13th.

Q. Excuse me, January 13th, '77.

A. Right.

Q. Did you come alone?

A. No.

Q. Who did you come with?

A. Don Mason, another business agent.

Q. Did you have any discussions with Mr. Mitchell and Mr. Stanley?

A. Yes, I did.

Q. Before going into the hearing?

A. Yes, I did.

Q. Who was present at those discussions?

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A. Don Mason, myself, Harry Stanley, and William Mitchell.

Q. Where did they take place?

A. Downstairs in the UPS building.

Q. To the best of your recollection, what was said and by whom?

A. To the best of my recollection, I told Bill that they claim that you went home, that you falsified your timecards, and that you were stealing time.

Bill told me that he did none of that. He was on the property at all times, and his timecards were proof.

And I said, "Okay, Bill. Let's go upstairs and find out what they got."

Q. When did you learn for the first time that there was an allegation of falsification of the timecards?

A. When they put them on the Notice.

Q. So, you knew that as early as July of '76?

A. Yes.

Q. Did you ever engage anyone, or requested anyone to check the punching clock at the Staten Island facility?

MR. PARSONNET: What do you mean "check"?

MR. LEITEL: Examine.

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those cards from the company?

A. No. It's not standard procedure.

MR. PARSONNET: You mean before the meeting?

MR. LEITEL: Right.

Q. Your answer was no, you did not request them?
A. Right.
Q. You went upstairs, the four of you?
A. Right.
Q. Who was present at the meeting upstairs?
A. For the company?
Q. Yes.
A. It was Lou Parriello, Jim Kilkenny. And I believe there was two supervisors in the room at the same time. There was four of them, I believe.
Q. What, if anything, was said at that meeting, and by whom?
A. Mr. Kilkenny ran the meeting, he was acting in Elmer Kenworth's place. For some reason Mr. Kenworth was sick.
Q. Who is Mr. Kenworth?
A. Kenworth is division manager for the Staten Island building.
Mr. Kilkenny produced the timecards of all the days that they alleged that Mitchell had left the

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Q. Within 30 days of January 13th?
A. Whatever the date was of the discharge.
Q. You stated before that you informed Mr. Mitchell at that time that he would have to pay his own expenses.

A. That's right.

Q. Did he voice any surprise as to that?

A. Said he didn't have the money to go anyway.

Q. Did you tell him that he would have to pay the expenses, at that time, of any of his witnesses?

A. Never came up about his witnesses, because he knew that Anderson and Murray won't come upstairs and testify for him then.

And he was sitting in at Staten Island, so I didn't know where he was going to come up with any witnesses.

Q. Didn't you say a moment ago that he might have other witnesses?

A. Yes, I told him.

Q. In addition to Anderson and Murray?

A. Right.

Q. Any discussions or if he could come up with other witnesses who would pay their expenses?

A. He never asked.

Q. Did you tell him?

A. No.

[66]

Q. Did you ever have any further discussions with Mr. Mason regarding whether or not he checked out with these other people?

A. Yes, I did.

Q. When was that discussion held?

A. I guess a couple of weeks later, a week later when we were in the office.

Q. What did Mr. Mason inform you, if anything, with that?

A. I believe he said he called up Staten Island and none of them would come forward and testify or give written statements, substantiating Mr. Mitchell.

Q. Did they say that they were against Mr. Mitchell.

A. No, they didn't. They just stated that they wouldn't get involved and didn't want to testify, wouldn't give us written statements.

Q. Did he indicate that he had spoken to all of these people?

A. No, he didn't.

Q. Did he indicate which of any of these people he had, in fact, spoken to?

A. He told me he had talked to some of the guys on pre-load, and none of them wanted to testify for Mitchell.

Q. Mitchell, did you ask him if he had spoken to

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calling me or I was calling him.

Q. During any of these conversations, did you tell Mr. Mitchell that Mr. Mason had contacted all of these other people, or you thought that he had contacted all of these other people, and that they had declined to give statements?

A. I told Mr. Mitchell that I couldn't get anybody to come forward and testify for him. I didn't say all or some, that's what I told him.

Q. Do you remember when you told him this?

A. One of the phone conversations we had.

Q. What was Mr. Mitchell's reaction, if any, to that?

A. Nothing; so be it, that was it.

Q. Did Mr. Mitchell during any of these conversations, again indicate his desire to go to the grievance hearing?

A. No, he didn't.

Q. Did he at any time, during any of these telephone conversations, again ask about funds for getting to these grievance hearings?

A. No, he didn't.

Q. You had asked Mr. Mitchell for a notarized statement?

[69]

A. Yes, I did.

Q. And you received that notarized statement at some time?

A. Some time, I just don't remember what date I received it.

Q. When were you notified for the first time of the date for the grievance hearing regarding Mr. Mitchell and the place of such a hearing?

A. I believe it was either the Thursday or Friday before the week, before the Panel was held.

Q. Could you look at the calendar, Mr. Purcell, and see if you can give me the day?

A. The Panel is always held on Tuesdays and Wednesdays. Okay, so if I got the call the 14th was on a Monday, I had to get it Thursday or Friday.

Q. This was——

A. The 14th was a Monday is correct.

So, I got the call either Thursday or Friday.

Q. And the Thursday or Friday would have been the —Thursday, the 10th of February, and Friday would have been the 11th of February?

A. I got a call from the conference to my office telling me—I don't know whether I got the one or Mason got the call—but one of us got the call that the

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A. No, they never let us do that. Only at the hearing. In other words, what I'm telling you, physically I go to the hearing, and after that hearing I call out to the processor and I want to interview Brian Film, they wouldn't let me.

Q. This is an UPS policy?

A. It is a UPS policy as long as I have been in the Local.

Q. Not to let the Local interview any members of employees of UPS that might be witnesses?

A. Management employees.

Q. That might be witnesses against a member of your union, management?

A. Yes.

Q. So in addition to not providing prior to the hearing, not providing you with——

A. Which union are you talking about now?

Q. Let's talk about the hearing that was held on January 13th.

A. Yes.

Q. —in addition to not being provided with any particulars of the charges, specifications of the charges, it is an UPS policy not to allow you to interview any of their witnesses, management witnesses?

[84]

A. Until the hearing.

Q. Until the moment of the hearing?

A. That's right.

Q. After the January 13th hearing and before the grievance meeting on the 16th of March——

A. Right.

Q. —did you attempt to interview any of the management witnesses?

A. They will not let you.

Q. Is that, too, an UPS policy?

A. Yes, it was.

Q. Even after a discharge and before a grievance hearing——

A. Yes, it is.

Q. —not to permit you to interview any of their witnesses?

A. Yes, it is.

Q. Did you following the January 13th meeting or hearing and up to the February 16th meeting, did you obtain any copies of any of the statements of UPS' managers?

A. They will not give them to you.

Q. Is that, too, a policy of UPS to deny you copies of the statements of their management personnel, who

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A. Yes.

Q. Were you familiar with the procedures, or are there procedures for obtaining an adjournment of a hearing?

A. No.

Q. There are no procedures for obtaining one, or you are not familiar with it?

A. No, at that time I was not familiar with it. I had no reason to be, because Mitchell didn't ask me to adjourn it.

Q. Did you know that the next Atlantic Area grievance meeting was to be held in March of '77?

A. Yes, I did.

Q. Did you know before the February 16th meeting?

A. Yes, I did.

Q. Did you know that that was going to be held in Philadelphia?

A. Yes, I did.

Q. Did you know that there was one coming up in May?

A. Every other month.

Q. '77, and did you know that that one was going to be held in Atlantic City, New Jersey?

A. Yes, I did.

[115]

Mr. Parsonnet: You mean the timecards?

A. Timecards you are talking about?

Q. Timecards, yes.

A. Excuse me.

Yes, they were.

Q. They were presented?

A. Yes.

Q. Who were they presented by?

A. Jim Kilkenny.

Q. What, to your recollection, did Mr. Kilkenny say about those cards?

A. He put those cards into evidence to see that there was a punch-in time and such and such time and punch-out time on the dates that they allege Mr. Mitchell was home.

Q. Prior to that meeting, did you ever request from UPS, in the management, the opportunity to again inspect these cards?

A. I saw them at the hearing.

Q. Yes, I'm talking about following the January 13th hearing.

A. When I asked Mr. Kilkenny if I could look at the statement, and everything, I assumed that they would be in there, and he said no.

Q. In other words, you assumed that your request

ANSWERS TO INTERROGATORIES ON BEHALF OF LOCAL UNION NO. 177

8. All who had cases presented to the AAPGC were advised that they had to pay their own way. All who attended paid their own expenses. No grievant had his or her expenses paid by the Local Union.

9. Article 42 of the U. P. S.-N. J. Area Supplement which provide *inter alia,* that grievances are heard by the next AAPGC meeting, at least seven days after submission and preference is given to discharge case.

   An agenda of meetings is set up at the beginning of each year for the year setting dates and places for each meeting. Discharge cases are given preference to be heard first at each such meeting; and must be submitted at least seven days prior to the meeting which was done in Plaintiff's case.

10. There was no transcript taken. The names and addresses of the committee members were:

    David Murray
    20 Hook Mountain Road
    Pinebrook, New Jersey

    John Foley
    c/o U. P. S.
    8325 Ardwich Ardmore Road
    Landover, Maryland

    Frank Feely
    51 Weaver Street
    Greenwich, Connecticut 06830

    Alfred Barlow
    c/o Eastern Conference of Teamsters
    4641 Montgomery Avenue
    Bethesday, Maryland 20014

Russell Hogan
P. O. Box 11298
Greensboro, North Carolina 27409

John Sullivan
1030 South Dupont Street
Baltimore, Maryland 21223

DECISION OF THE COURT DATED OCTOBER 23, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

78 C 1547

WILLIAM MITCHELL,

Plaintiff,

—against—

UNITED PARCEL SERVICE, INC., et al.,

Defendants.

MEMORANDUM AND ORDER

SIFTON, *District Judge.*

Pursuant to Section 301 of the Labor Management Relations Act ("LMRA"), 29 U. S. C. § 185, plaintiff, William Mitchell, instituted this action against his former employer and his union alleging wrongful discharge and inadequate representation. The suit was commenced over a year after a joint arbitation panel, convened in accordance with the collective bargaining agreement between defendants, issued an award sustaining Mitchell's discharge for allegedly falsifying his time cards. Mitchell seeks reinstatement and damages primarily on the ground that he was inadequately represented by his union before the joint grievance committee.

This case bears great resemblance to *Wallace v. AT&T*, 460 F. Supp. 755 (E. D. N. Y. 1978), in which this Court dismissed a similar complaint as time barred

under CPLR 7511(a). In *Wallace*, this Court determined that a suit seeking reinstatement and damages for allegedly wrongful discharge pursuant to an arbitration award is appropriately characterized as a suit to vacate the award and is, therefore subject to the 90-day limitation period provided in the State's statute. Further, this Court held that in view of the inter-relationship between a Section 301 claim against an employer and an unfair representation claim against a union—both stemming from the allegedly wrongful discharge of an employee contrary to the terms of the collective bargaining agreement—both the unfair representation claim against the union and the improper discharge claim against the employer are properly governed by the same statute. A reexamination of *Wallace* suggests that these principles are equally applicable to the present case and that a similar result should obtain here.

This Court reaches the conclusion that summary judgment is appropriate despite the arguments set forth in plaintiff's brief which seek to have the Court distinguish or reconsider *Wallace*. First, Mitchell suggests that he is not seeking to vacate an arbitration award since a meaningful arbitration of his grievance never occurred. However, the failure to seek to vacate the award *in haec verba* cannot be determinative. The relief sought was expressly denied in an arbitation award issued as a result of a full-scale, arbitration proceeding. The effect of any grant of the relief sought by this Court would be to vacate the determination of the arbitrators.

Plaintiff additionally calls attention to a footnote in the Supreme Court decision of *UAW v. Hoosier Cardinal Corp.*, 383 U. S. 696, 707 n. 9 (1965), which states that "other questions would be raised if this case presented a state law characterization of a 301 suit that reasonably described the nature of the cause of action, but required application of an unusually short or long limitation period." *Id.* note 9,

at 707. In view of the three-month statute of limitations contained in the Federal Arbitration Statute, 9 U. S. C. § 12, it is at least questionable whether the Supreme Court would regard the New York limitation as "too short." Nor is it apparent what "other questions" would be raised by plaintiff in this case as a result of the application of the 90-day period, or why such questions should be resolved in plaintiff's favor. The policy favoring "relatively rapid disposition of labor disputes" recognized in *Hoosier Cardinal* combines in this case with the policy favoring arbitration as a means of securing a quick and final resolution of disputes in general. Accordingly, for the reasons set forth herein and in this Court's earlier opinion in *Wallace v. AT&T, supra,* defendants' motion for summary judgment is granted and the Clerk is directed to enter judgment dismissing plaintiff's complaint and to mail a copy of this opinion to counsel for all parties.

So Ordered.

Dated: Brooklyn, New York
October 23, 1979.

/s/ Charles P. Sifton
United State District Judge

JUDGMENT FILED OCTOBER 26, 1979 DISMISSING THE PLAINTIFF'S COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 C 1547

WILLIAM MITCHELL,

Plaintiff,

– against –

UNITED PARCEL SERVICE, INC., et al.,

Defendants.

JUDGMENT

A Memorandum and order of Honorable Charles P. Sifton, United States District Judge, having been filed on October 25, 1979, granting defendants' motion for summary judgment, and directing the Clerk of Court to enter judgment dismissing plaintiff's complaint, it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendants; that defendants' motion for summary judgment is granted; and that judgment is hereby entered dismissing the complaint.

Dated: Brooklyn, New York
October 25, 1979

H. WEARE
Clerk of Court

DECISION OF THE COURT OF APPEALS DATED MARCH 3, 1980

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 748—September Term, 1979
(Argued February 29, 1980 Decided March 3, 1980)
Docket No. 79-7803

WILLIAM MITCHELL,
Plaintiff-Appellant,

—v.—

UNITED PARCEL SERVICE, INC., and DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177,
Defendants-Appellees.

Before:

KAUFMAN, *Chief Judge,*
TIMBERS, *Circuit Judge,*
and WERKER, *District Judge.**

Appeal from a judgment entered in the Eastern District of New York, Charles P. Sifton, *District Judge,* dismissing appellant's wrongful discharge complaint under § 301 of the Labor Management Relations Act as barred by the applicable New York statute of limitations.

Reversed and remanded.

* Hon. Henry F. Werker, United States District Judge for the Southern District of New York, sitting by designation.

DAVID JAROSLAWICZ, New York, N. Y. (Ira Leitel, Carol Mellor, and Leitel and Jaroslawicz, New York, N. Y., on the brief), *for appellant Mitchell.*

M. DAVID ZURNDORFER, New York, N. Y. (Edward Silver, Mark L. Goldstein and Proskauer Rose Goetz & Mendelsohn, New York, N. Y., on the brief), *for appellee United Parcel Service, Inc.*

ALBERT S. PARSONNET, Newark, N. J. (Parsonnet, Duggan & Pykon, Newark, N. J., on the brief), *for appellee Department Store And Wholesale Drivers, Warehousemen And Helpers Local Union #177.*

OPINION

TIMBERS, *Circuit Judge:*

Appellant William Mitchell appeals from a judgment entered in the Eastern District of New York, Charles P. Sifton, *District Judge,* dismissing appellant's wrongful discharge complaint under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185 (1976), as barred by the 90 day limitation period of § 7511 of the New York Civil Practice Law and Rules. The sole issue on appeal [1] is whether the district court erred in applying § 7511 to the instant action. We hold that it did.

1. On appeal, appellees argue that the complaint was properly dismissed not only because it was time-barred, but also because appellant failed to exhaust his intra-union remedies and failed to raise a triable issue concerning appellee union's alleged breach of its duty of fair representation. The district court, however, did not address these issues. We therefore shall not address them for the first time here. Appellees are free to raise these issues in the district court on remand.

I.

Appellant, a member of Local Union #177 of the Department Store and Wholesale Drivers, Warehousemen and Helpers, was employed as a car washer by United Parcel Service, Inc. (UPS). In January 1977 appellant was discharged by UPS for dishonest acts, including "stealing time" and falsifying time cards. Appellant, who denied the charges against him, requested that his union file a grievance on his behalf contesting the discharge. As a member of Local Union #177, the terms of appellant's employment, including grounds for discharge and grievance procedures, were governed by the collective bargaining agreement between UPS and Local Union #177. Pursuant to this agreement appellant's grievance was submitted to an arbitration panel—the Joint Atlantic Area Parcel Grievance Committee—for final resolution. Appellant was represented by his union at the hearing before this panel. On February 16, 1977 the arbitration panel denied appellant's grievance and upheld his discharge. According to the collective bargaining agreement, this decision was final and binding.

Seventeen months after the arbitral decision was rendered, appellant filed an action under LMRA § 301 [2] against his union and employer, alleging that UPS had breached the collective bargaining agreement by wrongfully discharging him and that Local Union #177 had breached its statutory duty of fair representation by the

2. Section 301 of the Labor Management Relations Act, 29 U. S. C. § 185 (1976), provides in relevant part:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

manner in which it handled appellant's grievance. The district court granted appellees' motions for summary judgment, dismissing the complaint on the ground that the action was barred by the 90 day limitation period set forth in § 7511.[3]

II.

There is no federal statute of limitations applicable to § 301 actions. As a result, the Supreme Court has held that "the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO v. Hoosier Cardinal Corp.*, 383 U. S. 696, 704-05 (1966).

The district court, reasoning the "[t]he effect of any grant of relief . . . would be to vacate the determination of the arbitrators," held that the appropriate state statute of limitations was the 90 day period for "application[s] to vacate or modify an [arbitration] award". N. Y. Civ. Prac. Law § 7511 (McKinney 1963). We disagree. We hold that the limitation period which should have been applied is New York's six year period for actions alleging breach of contract. N .Y. Civ. Prac. Law § 213(2) (McKinney 1972).

In addressing the question of which New York statute of limitations should be applied in this case, we turn first to our decision in *Abrams v. Carrier Corp.*, 434 F. 2d 1234 (2 Cir. 1970), *cert. denied*, 401 U. S. 1009 (1971), where we held that:

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3. N. Y. Civ. Prac. Law § 7511 (McKinney 1963) provides that:

> "[a]n application to vacate or modify an [arbitration] award may be made by a party within ninety days after its delivery to him."

> "when a § 301 suit is brought against an employer alleging breach of the collective bargaining agreement in conjunction with a claim that the union breached its fair representation duty to pursue the employee's grievance, the same period of limitations should be applied to both claims. In the present case, the proper limitation period . . . is the six-year limitation set out in N. Y. CPLR § 213(2) for 'an action upon a contractual obligation or liability express or implied.'" *Id.* at 1252-53 (footnote omitted).

The factual claims underlying the § 301 action in *Abrams* were the same as those in the instant case, namely, a wrongful discharge by the employer coupled with a bad faith failure by the union to represent the employee adequately in discharge proceedings. The only difference between *Abrams* and the instant case is that here the employee was terminated after his grievance was rejected at arbitration, whereas in *Abrams* the grievance was not taken to arbitration. Citing this difference, appellees urge that we apply a different statute of limitations to the § 301 action in this case than the six year statute of limitations which we applied to the § 301 action in *Abrams*. We do not believe that such a fractionalized approach to § 301 wrongful discharge actions is warranted.

In determining which state statute of limitations to apply to a federal cause of action, courts must characterize the action in the manner that "best effectuates the federal policy at issue." *Butler v. Local Union 823, Int'l Brotherhood of Teamsters, etc.*, 514 F. 2d 442, 446 (8 Cir. 1975); *Charney v. Thomas*, 372 F. 2d 97, 100 (6 Cir. 1967). Appellees, pointing chiefly to the federal policy of according finality to arbitration awards and the federal goal of "relatively rapid disposition of labor disputes," *Int'l Union, etc. v. Hoosier Cardinal Corp.*,

supra, 383 U. S. at 707, argue that § 301 wrongful discharge actions commenced *after* arbitral decisions should be governed by the 90 day limitation period even if other § 301 wrongful discharge actions are governed by another statute.

We do not agree. The Supreme Court has made it clear that the federal policy of according finality to arbitration awards must yield to the conflicting federal policy of providing employees with the opportunity "to secure individual redress for damaging failure of the employer to abide by the [collective bargaining] contract." *Hines v. Anchor Motor Freight, Inc.,* 424 U. S. 554, 571 (1976). In *Hines,* the Court granted discharged employees the right to sue employers and unions under § 301 despite the fact that the discharges had been upheld in "final" arbitration. In so doing, the Court rejected the argument that the federal policy of according finality to arbitration awards prevented employees from contesting arbitral decisions in § 301 actions. If we were to limit employee § 301 actions to a 90 day period following the adverse arbitral decision, we would severely restrict the Supreme Court's decision to allow employees to challenge arbitral decisions in conjunction with charges of bad faith representation by their union.

Furthermore, § 301 actions do not require the short limitation periods which are generally applied to assaults on arbitration awards. Contrary to the district court's characterization, § 301 actions cannot be equated to direct attacks on arbitration awards, nor can they be viewed as the same threat to the finality of arbitration awards. Arbitration awards cannot be vacated pursuant to § 301 on the ground that the arbitrators erred in their factual findings, or that the arbitrators reached faulty legal conclusions, or that the proceedings were flawed. *Hines v. Anchor Motor Freight, Inc., supra,* 424 U. S. at 571;

Barbarino v. Anchor Motor Freight, Inc., 421 F. Supp. 1003, 1005 (W. D. N. Y. 1976). Rather, actions under § 301 are limited to those rare cases where the discharged employee can demonstrate *both* that the employer violated the collective bargaining agreement by discharging him *and* that the union violated its statutory duty by failing to represent him in good faith.

This is a heavy burden which the § 301 plaintiff must shoulder in order to overturn his discharge. There is no need to increase this burden by requiring the employee to commence the action in an unduly short period of time after his discharge. To require an employee—who is suddenly out of work—to obtain new counsel and file an action against his union and employer all within 90 days of his discharge strikes us as unwarranted.

Neither do we accept the argument that the 90 day limitation period is necessary to further the federal goal of relatively rapid disposition of labor disputes. The Court in *Hoosier, supra,* 383 U. S. at 707, indicated that a six year statute of limitations adequately furthered this federal labor policy. Far from suggesting that a 90 day period was needed to reach the goal of "relatively rapid" resolution of disputes, the *Hoosier* Court indicated that "unusually short" limitation periods—such as a 60 day New Mexico statute—should not be applied to § 301 actions. 383 U. S. at 707 n. 9.

Finally, we note that the characterization of § 301 actions such as the instant one as actions "to vacate arbitration awards" is not even conceptually sound. First, an action to vacate an arbitration award under New York law may not be instituted by discharged employees like appellant. *In re Soto,* 7 N. Y. 2d 397, 165 N. E. 2d 855, 198 N. Y. S. 2d 282 (1960). This difference is not an insubstantial one. While it may be reasonable

to require the parties to a bargaining agreement (*i.e.*, the union and the employer) to contest an arbitral decision within 90 days, individual employees may well lack the resources to act as quickly. Second, a § 301 action is procedurally quite distinct from any action to vacate or modify an arbitration award. "Although the effect of a judgment for [the discharged employee] would be to nullify the arbitral decision, the § 301 action is 'independent' of the grievance process . . . . Indeed, such a claim can be brought even before an arbitral decision where a union refuses in bad faith to process a grievance." *Smart v. Ellis Trucking Co.*, 580 F. 2d 215, 219 (6 Cir. 1978), *cert. denied*, 440 U. S. 958 (1979); *see Hines v. Anchor Motor Freight, Inc., supra*, 424 U. S. at 567-68; *Vaca v. Sipes*, 386 U. S. 171 (1967).

Regardless of whether an arbitration decision has been entered, the issue in a § 301 wrongful discharge action remains whether the employer has breached the collective bargaining contract and whether a union breach of duty contributed to the contractual breach. *Hines v. Anchor Motor Freight, Inc., supra*, 424 U. S. at 568. The mere fact that an arbitral decision has been rendered during the course of the employee termination process does not convert the character of a § 301 action from an action for breach of contract to an action for vacating an arbitration award.

III.

In summary, we reject the district court's characterization of the instant § 301 action as an action to vacate an arbitration award, and accordingly reverse the district court's dismissal of appellant's complaint as barred by § 7511. We hold that New York's six year limitation period for contractual breaches, § 213(2), is applicable to

LMRA § 301 actions by employees alleging wrongful discharge by the employer and breach of the fair representation duty by the union—regardless of whether the discharge was upheld by an arbitral panel or became final short of arbitration. Applying the six year limitation period of § 213(2) provides for relatively rapid disposition of labor disputes without undermining an employee's ability to vindicate his rights through § 301 actions. Thus, application of § 213(2) rather than § 7511 allows us to "best effectuate" the several federal policies implicated by actions under § 301.

Reversed and remanded.